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PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM THE
)	CIRCUIT COURT OF
Plaintiff--Appellee,)	COOK COUNTY.
)	
v.)	
)	
CLAUDE SNEED (Impleaded),	)	HONORABLE
	)	DANIEL J. RYAN,
Defendant--Appellant.	)	PRESIDING

PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

BEFORE EGAN, P.J., BURKE and HALLETT, JJ.

Claude Sneed, defendant, Alan Brown, and Percy Brown were charged by indictment with the crime of armed robbery (Ill. Rev. Stat. 1969, ch. 38, par. 18-2). All three men waived trial by jury and proceeded with a bench trial. During the bench trial, Alan Brown and Percy Brown entered pleas of guilty and were sentenced to a term of two to three years. At the conclusion of the bench trial, Claude Sneed was found guilty and sentenced to a term of three to seven years. Sneed alone appeals, arguing that the evidence was insufficient to establish his guilt beyond a reasonable doubt, that he was denied a fair trial by the conduct of the trial judge, and that his sentence is excessive.

At trial, Richard Crowley, a Chicago police officer testified that on September 7, 1969, at 4:30 A.M., he was off duty driving his own vehicle when he observed a white Mustang proceeding northbound on Harlem Avenue. Defendant was driving the car and Alan Brown and Percy Brown were passengers. The car slowed down as it approached the Clark gas station at 59th Street. The three occupants looked directly into the station which had two or three customers. The men hesitated and then proceeded northbound to 58th Street where they stopped their vehicle near a Martin gas station, which had no customers. Officer Crowley observed the defendant back the car into an alley immediately west of Harlem in the block north of the

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THE HECKMAN BINDERY

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station. One man left the car and walked into the station. Officer Crowley testified that he went around the block and as he returned to the station, he observed two men run from the station to the car parked in the alley. The car drove off in a northbound direction. Officer Crowley talked to Robert Trefil, the station attendant, who stated that he had just been robbed by the two men. Officer Crowley gave chase to the vehicle. When defendant stopped his vehicle for a red light at Archer and 55th Street, Officer Crowley stopped behind defendant's car, identified himself as a police officer, and informed the three men that they were under arrest. Officer Crowley testified that he held his star in one hand and his revolver in the other hand as he ordered the men out of their car. Claude Sneed, Alan Brown and Percy Brown each exited the car. The car began to roll and Officer Crowley ordered Sneed to put on the emergency brake. Sneed got back into the car and drove off. Officer Crowley fired four shots at the vehicle. Officer Sam Lynch and Captain Corbo of the Summit Police Department came to the scene and gave chase to the defendant's vehicle.

Anthony M. Corbo, a police captain for the Village of Summit, testified that on September 7, 1969, at approximately 5:00 A.M., he and Officer Lynch came to the intersection of Archer and 55th Street. They observed Officer Crowley holding two male negroes under arrest. They gave chase to a 1969 white Mustang driven by the defendant. During the chase Captain Corbo fired at the vehicle. After 3/4 of a mile, defendant lost control of the car and struck a pole. On the floor of the driver's side of the vehicle, Captain Corbo recovered two guns. Recovered from the passenger's side of the front of the vehicle was a wallet belonging to Robert Trefil and U. S. currency.

Robert J. Trefil testified that he was employed at the Martin gas station at 5810 S. Harlem, Summit, Illinois. On

September 7, 1969, at 4:30 A.M., he was working alone in the station when he was robbed by Alan Brown and Percy Brown. The men were armed with revolvers and took \$60.00 to \$65.00.

Richard Guido, a police officer for the Summit Police Department testified that on September 7, 1969, at approximately 4:30 A.M., he proceeded to the Martin gas station at 59th and Harlem, Summit, Illinois. He then proceeded to the area of 171st and Archer Road where he met Officer Crowley who had Alan Brown and Percy Brown in custody.

Claude Sneed, defendant, testified that on September 7, 1969, at approximately 4:30 A.M., he was driving a rented white Mustang southbound on Harlem Avenue. Percy Brown and Alan Brown were passengers in his vehicle. One of the Browns asked him to stop to get a package of cigarettes. Defendant testified that at approximately 59th Street he stopped near a Martin gas station. Percy Brown and Alan Brown got out of the car and went into the station. The Browns came back to the car carrying money and guns and ordered him to proceed. Defendant testified that prior to the time Alan Brown and Percy Brown re-entered his vehicle, he did not know that they were going to rob the gas station. Defendant stated that he stopped for a stop light, when a man got out of a car behind him, produced a gun and ordered everyone out of defendant's car. Defendant testified that he did not know the man was a police officer and the man did not produce any identification showing that he was a police officer. Defendant's car began to coast and the man who had stopped them ordered defendant to get back into the car and put on the emergency brake. Defendant testified that he entered the vehicle and drove on. After proceeding for some distance, he hit a post and was subsequently placed under arrest.

Defendant's first contention is that the evidence was

insufficient to establish beyond a reasonable doubt that he was accountable for the actions of his co-defendants. Section 5-2 of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, par. 5-2) provides that a person is legally accountable for the conduct of another when:

"(c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of that offense.* * *"

Where defendants have a common design to do an unlawful act, the act of any one of them done in furtherance of the common design is the act of all (People v. Jones (1973), 12 Ill. App. 3d 643, 299 N. E. 77). Proof of a common design need not be supported by words of agreement but can be drawn from the circumstances surrounding the commission of the act. People v. Richardson (1965), 32 Ill. 2d 472, 207 N. E. 2d 478.

In the case at bar, the evidence demonstrated that at 4:30 A.M. the defendant was driving a car on Harlem Avenue in which Alan Brown and Percy Brown were passengers. The defendant slowed down at a gas station which had several customers. He then proceeded one block until he reached a second gas station which had no customers. Defendant backed his car into an alley. Alan Brown and Percy Brown left the vehicle and proceeded to rob the station. They then re-entered defendant's vehicle and all three men left the scene. After determining that a robbery had occurred, Officer Crowley gave chase. When defendant stopped his vehicle for a stop light some distance from the scene of the robbery, Officer Crowley got out of his car, produced his badge, announced his office and ordered the men out of the vehicle. All three men got out of the vehicle. When the vehicle began to roll, Officer Crowley ordered defendant to put on the emergency brake.

Defendant got back into the vehicle and drove off with two Summit police officers in pursuit. Both Officer Crowley and the Summit police officers fired at defendant's vehicle. Defendant stopped only when his car crashed into a post. A search of defendant's vehicle revealed two revolvers on the floor of the driver's side of the front seat and, on the passenger's side, some currency and Trefil's wallet. From the totality of these circumstances, the trial judge could have reasonably found that the defendant had lent his approval to the robbery by aiding and abetting in its commission. People v. v. Richardson (1971), 132 Ill. App. 2d 712, 270 N. E. 2d 568.

Defendant's second contention is that he was denied a fair trial by the conduct of the trial judge. Defendant first complains that when his case was called on October 20, 1972, the comments of the trial judge demonstrated that he was more interested in the disposition of cases than in the orderly administration of justice. The record reflects that when defendant's case was called, the trial judge was informed that Officer Guido, who had been subpoenaed by defense counsel, had also been subpoenaed to appear in another court in the Civic Center. A discussion followed as to whether or not Officer Guido should be allowed to proceed to the Civic Center or whether he should stay and testify in this case. During the discussion, the trial judge suggested that Officer Guido be allowed to proceed downtown, since he had received that subpoena first. The trial judge also suggested that if necessary, the case could be put over until the following Monday. The trial judge stated that he had waited for several hours for defendant the previous day, and would allow Officer Guido to proceed downtown. This colloquy does not support defendant's argument that

the trial judge demonstrated impatience.

Defendant next complains that at the conclusion of the State's case, defense counsel's motion for a directed verdict was summarily denied without argument. When a criminal case is tried before the court, the matter of permitting oral argument rests in the sound discretion of the trial judge (People v. Wesley (1964), 30 Ill. 2d 131, 195 N. E. 2d 708; People v. Hall (1973), 10 Ill. App. 3d 1011, 295 N. E. 2d 545). Here, the State had established a prima facie case and the trial judge's action in summarily denying defendant's motion for a directed verdict was not improper.

Defendant also urges that the trial judge's comments after finding defendant guilty, indicates that he was not fair and impartial. Again the record failed to support defendant's argument. The record reflects that after defendant was found guilty, defense counsel requested a pre-sentence investigation. Defense counsel informed the trial judge that the defendant did not have a prior criminal record and the trial judge responded that defendant was going to have a record. The trial judge ordered the pre-sentence investigation, revoked defendant's bond, and ordered him taken into custody. The case was continued for one week at which time a pre-sentence investigation was submitted to the court. In the case at bar the record demonstrates that defense counsel requested a pre-sentence investigation which was promptly ordered by the court. The trial judge's action in revoking defendant's bond and taking him into custody after he had been found guilty was perfectly proper. The trial judge's statement made after defendant had been found guilty that he was going to have a criminal record does not in any manner demonstrate prejudice.

Defendant next contends that his sentence is excessive

and should be reduced. Defendant argues that he was a youth of 19 years at the time of the crime and his only prior record was that he had been fined \$100.00. The power to reduce sentences should be exercised with caution and circumspection because the trial judge has a superior opportunity during the course of trial and the hearing in aggravation and mitigation to determine the proper sentence than do reviewing courts (People v. Caldwell (1968), 39 Ill. 2d 346, 236 N. E. 2d 706; People v. Taylor (1965), 33 Ill. 2d 417, 211 N. E. 2d 673). Defendant was convicted of armed robbery in violation of section 18-2 of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, par. 18-2) the penalty for which, at the time of the commission of the crime, was a minimum of two years. Under the present Unified Code of Corrections, armed robbery is a Class 1 felony (Ill. Rev. Stat. 1973, ch. 38, par. 18-2) and the minimum possible sentence is a term of four years (Ill. Rev. Stat. 1973, Supplement ch. 38, par. 1005-8-1 (c) (2)). Defendant's sentence of three to seven years is within the statutory limits for the offense and is not disproportionate to the nature of the offense.

Defendant also argues that his sentence is unconstitutionally excessive because it was a great disparity with the sentences of his co-defendants, who were the actual armed robbers. The imposition of different sentences upon co-defendants does not impeach defendant's sentence (People v. Lynch (1973), 14 Ill. App. 3d 568, 302 N. E. 2d 688; People v. Cox (1970), 119 Ill. App. 2d 163, 255 N. E. 2d 208). As we have pointed out, defendant's sentence was within the statutory limits for the offense at the time it was committed, and is less than that required now under the Unified Code of Corrections. The facts of the case demonstrate that when stopped by the police, Alan Brown and Percy Brown surrendered without resistance. However, defendant attempted

to escape and led the police on a high speed auto chase. Defendant stopped only after losing control of his car and hitting a post. After a review of all of the facts adduced at trial, we cannot say that the trial judge abused his discretion in sentencing the defendant.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

No. 58910



3D

24 I.A. 38

ADLER BUSINESS MACHINES, INC.,)	
a Corporation,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
BABBEY OFFICE MACHINES, INC.,	)	HONORABLE
a Corporation,	)	MEYER H. GOLDSTEIN,
Defendant-Appellant.	)	JUDGE PRESIDING.

Before Hayes, P.J., Leighton and Downing, JJ.

Per Curiam:

The plaintiff, Adler Business Machines, Inc., brought this action on a theory of an account stated between the parties in the amount of \$2,513.00 for merchandise sold to the defendant, Babbey Office Machines, Inc. Defendant filed a jury demand and an answer denying that the merchandise was sold at defendant's "special instance and request" as alleged in the complaint, admitting the plaintiff had demanded payment and defendant had refused, but denying the refusal was "neglectful." Plaintiff then moved for summary judgment based on the answers given by Joseph G. Babbey, the defendant's president, at a discovery deposition on June 16, 1972, which motion the court granted on January 11, 1973. Defendant appeals, contending summary judgment should not have been granted because the defendant's deposition was not on file when the court entered judgment on January 11, 1973, as required by Section 57(3) of the Illinois Civil Practice Act, and because the affidavit in support of plaintiff's motion for summary judgment did not comply with the requirements of Supreme Court Rule 191 (Ill. Rev. Stat. 1973, ch. 110, par. 57(3) and ch. 110A, par. 191). Defendant also contends it was denied its constitutional right to have a jury decide controverted facts.

Plaintiff's complaint, filed January 21, 1972, alleged

that plaintiff sold and delivered to the defendant at its "special instance and request" merchandise amounting to \$2,513.00 as set forth in Exhibit A attached to the complaint, a statement on the stationery of Adler dated November 30, 1971, for \$2,513.00. Defendant's answer denied that the merchandise was sold at its special instance and request as indicated above.

On November 15, 1972, plaintiff filed a written motion for summary judgment which alleged that Mr. Joseph G. Babbey, president of the defendant, testified "substantially" at a discovery deposition on June 16, 1972, that the merchandise in question was ordered by the vice president, Charles Soos, and by the treasurer, Elroy Busche, of the defendant corporation, that the merchandise was received by the corporation and sold by the corporation, had not been paid for, and to the best of Mr. Babbey's recollection the sum of \$2,513.00 "was not paid by the company," and "was the amount owed." The affidavit of Arthur Raphael, in support of the motion, stated that the deposition of Mr. Babbey had been taken in his presence and that the answers given by Babbey were "substantially as is set forth" in the motion and that the recently transcribed deposition provided such information. The deposition, itself, was not attached. Defendant's written answer to the motion admitted that Babbey's deposition had been taken, stated that the testimony "speaks for itself," and that the motion did not quote many pertinent questions and answers, such as testimony that Babbey, as president, did not desire to do business with plaintiff, and never ordered any merchandise from plaintiff, did not want or consent to do business with plaintiff and that one of Babbey's reasons was that doing so would jeopardize his existing franchise.

The matter had been set for January 11, 1973, and on that date the court entered summary judgment in the amount

of \$2,513.00 in an order which stated that the defendant was absent and not represented, that the court "heard the evidence and the arguments of counsel" and was "fully advised in the premises."

Although the record contains no report of proceedings for any of the dates in question, there is a copy of Babbey's deposition, which is stamped filed with the Clerk on March 1, 1973. Joseph G. Babbey testified, at this discovery deposition, that he was president of the defendant, that in 1970, Charles Soos, vice president in charge of sales, and Elroy Busche, treasurer, ordered 12 machines from Adler without his approval and without his knowledge. In most cases these two men did take it upon themselves to order as they saw fit, although neither had authority to sign checks on the corporate account. He identified Soos's signature as appearing on an exhibit which is a purchase order for 12 cartons of typewriters. In March of 1970 the merchandise set forth in that exhibit was received. Some of the merchandise, about six portables, were paid for by his company and of \$2,068.00 originally billed on Exhibit 1, a balance remained due of \$856.00. This partial payment would have been by a check signed by him and drawn on the corporate account. He also identified as having been "brought to his attention" letters dated April 12, 1971, and August 5, 1971, requesting payment on account. The sale of the merchandise, aside from the items sold through the store, generated monies that were deposited in the corporate checking accounts. When asked, "To the best of your recollection, the sum set forth of \$2,513.00 has not been paid by your company to Adler," he answered, "This amount is owed them, I guess."

The purpose of the summary judgment procedure of Section 57 of the Civil Practice Act is to determine whether any genuine issue of material fact exists and to summarily dispose of cases where none does exist so as to avoid the

congestion of trial calendars and the expense of unnecessary trials (Bituminous Casualty Corp. v. Merchants Motor Freight, Inc. (1973), 12 Ill. App. 3d 1024, 1029-1030, 299 N.E.2d 405). Defendant does not point to any controverted issue of fact in this case. Instead, he contends that summary judgment should not have been granted because the deposition of Babbey was not actually on file when judgment was entered and because the affidavit in support of the motion for summary judgment was defective. We shall deal first with whether there was any issue of material fact in the case and then turn to whether the proper procedure was followed.

In Wolford Morris Sales, Inc. v. Weiner (4th Dist. 1966), 75 Ill. App. 2d 238, 249-250, 221 N.E.2d 308, the court has described the essential elements of an account stated as follows:

"An account stated is an agreement between parties who have had previous transactions of a monetary character that the items of account are true and that the balance is correct; that the meeting of the minds of the parties upon the correctness of an account stated is usually the result of a statement of account by one party and agreement thereto by the other, but the form of agreement or assent is immaterial and such may be implied from the conduct of the parties and the circumstances of the case; that an account rendered by one and retained by the other beyond a reasonable time without objection constitutes a recognition of the correctness of the account and establishes an account stated so that it is conclusive unless impeached for fraud or mistake."

In the case at bar, the president of the defendant corporation, Joseph Babbey, admitted in his deposition that the vice president and treasurer, respectively, of the corporation ordered the merchandise, although over his objection. He stated that these men "outvoted" him on this subject and that there were discussions concerning the matter. He also admitted that the merchandise was received at the corporate offices, sold by agents of the corporation and the proceeds deposited in the corporate account. The corporation made a

payment of part of the money owing and Babbey testified that the balance of \$2,513.00 was in fact the amount "owed" after deducting the payments made by the corporation. Under these facts and circumstances, it does not appear that any material issue of fact was presented to the trial court and that the trial court properly entered summary judgment in favor of the plaintiff since the essential elements of an account stated were shown by these undisputed facts and admissions by Babbey.

Nevertheless defendant contends that since the deposition of Babbey was not filed in the trial court until March 1, 1973, and not presented to the trial court on January 11, 1973, at the time the summary judgment order was entered, the judgment should be reversed. Specifically, the defendant contends the court could not consider the deposition because it was not "on file" at the time of the hearing on January 11, 1973, as is required by Section 57(c) of the Civil Practice Act, and that the affidavit was defective.

Defendant contends that the affidavit of plaintiff's attorney does not comply with Supreme Court Rule 191 (Ill. Rev. Stat. 1973, ch. 110A, par. 191) since it does not set out the facts with particularity, sets out conclusions and facts not admissible in evidence, and sets out matters which he could not competently testify to and did not attach the deposition of Mr. Babbey. However, our reading of the affidavit and the motion for summary judgment convinces us that in pertinent part they merely recite portions of the testimony given by Mr. Babbey at his deposition, and that such statements would clearly be admissible against the defendant corporation at any trial.

Defendant claims that the deposition of Babbey was not presented to the trial court on January 11, 1973, but it has not seen fit to include a report of the proceedings on January 11, 1973, in the record. It is the responsibility of the appellant to provide a transcript of the proceedings, or a suitable substitute under Supreme Court Rule 323, to show

the error of which he complains. Where, as here, the judgment order recites that the court was "fully advised in the premises," it will ordinarily be presumed on appeal, unless the contrary is somehow shown, that the court heard sufficient evidence to justify its actions (Cohen v. Washington National Insurance Co. (1971), 2 Ill. App. 3d 149, 276 N.E.2d 6).

Since the defendant has not provided us with a report of proceedings, we must accept as true plaintiff's claim in its brief that the deposition was presented to the court and that the court read and considered it.

The issue then becomes whether the mere fact that the deposition was not on file with the Clerk is sufficient for reversal. We think Standard Oil Co. v. Lachenmyer (1972), 6 Ill. App. 3d 356, 285 N.E.2d 497, cited by the defendant, is distinguishable because the deposition in that case was never filed and was clearly not considered by the court. Here, the motion for summary judgment and the affidavit in support of the motion for summary judgment did contain averments that Babbey, the president of defendant corporation, had stated at the deposition that the vice president and treasurer of the corporation had ordered the merchandise, which was received, sold by the corporation, not paid for, and that \$2,513.00 was the amount "owed." Defendant's written answer to the motion for summary judgment admitted that the deposition of Babbey was taken and did not in any way deny or controvert the averments of fact above stated. Thus, even assuming that the deposition of Babbey was not on file with the Clerk and could not, strictly speaking, be considered by the court, it was not necessary for the court to consider the deposition since the plaintiff's representations as to its contents were not controverted by the defendant's answer to the motion. As a practical matter the contents of the deposition in this record indicate there is no material conflict between the statements

of plaintiff's attorney in the affidavit accompanying the motion for summary judgment and the statements actually made by Babbey at his deposition. While Supreme Court Rule 191 requires that the deposition be attached to the affidavit and Section 57(3) requires that it be on file, it is difficult to see what purpose would be served by remanding the case to the trial court since, when the deposition is considered, it is clear that summary judgment was properly entered. Any error was therefore harmless.

Finally, defendant has contended that his constitutional right to a trial by jury has been denied by the procedure followed in this case. The constitutional right to trial by jury includes the right to have a jury determine disputed material issues of fact. When, as here, no question of fact is presented, summary judgment does not deny a defendant his right to a trial by jury. Mitchell v. Ralston (1971), 130 Ill. App. 2d 759, 762, 266 N.E.2d 424.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

(Publish abstract only.)



24 I.A. 40^{3D}

60123

	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
	)	COOK COUNTY.
IN RE DAVID LITTLEJOHN, a minor.)	
	)	HONORABLE
	)	PETER COSTA,
	)	PRESIDING.

PER CURIAM: (First District, Second Division)

Before: Hayes, P.J., Stamos and Leighton, JJ.

David Littlejohn, a minor and hereinafter "respondent", was adjudicated a delinquent and declared a ward of the circuit court of Cook County by reason of the theft of property having a value less than \$150, in violation of section 16-1(a)(1) of the Criminal Code, pursuant to the provisions of the Juvenile Court Act (Ill. Rev. Stat. 1973, ch. 38, par. 16-1(a)(1); ch. 37, pars. 701-1, et seq.). He was committed to the Department of Corrections, the mittimus to issue, and has prosecuted this appeal.

The public defender of Cook County was appointed counsel for respondent on appeal and has filed in this court a motion for leave to withdraw as appellate counsel, pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, supported by a brief setting forth several grounds which he states could be raised as issues on this appeal but which he concludes are without merit and would not support the appeal. Copies of the brief and motion were forwarded to respondent, and he was allowed sixty days within which to file any points he desired in support of the appeal; he has not responded.

The petition for adjudication of delinquency was filed on September 21, 1974, charging respondent with the theft of a 10-speed racer bicycle belonging to Lawrence Adams on August 31, 1973. Respondent was ordered held in detention on October 16,

1973, and, at a hearing held on October 29, 1973, the public defender was appointed as his counsel in the matter and entered a plea of denial to the charge; counsel also requested that the matter be set for hearing at a later date with another petition then pending against respondent. The court ordered that respondent, aged fifteen years, be continued in custody, and a hearing on the petition was scheduled for November 13, 1973.

Evidence was adduced at the November 13th hearing on the petition that respondent was one of several boys who pulled the thirteen year old victim from his new, \$80 bicycle while the latter was waiting for a friend at a restaurant near East 79th Street in Chicago; respondent, dressed at that time in a black hat with a feather and two earrings in one ear, rode off on the bicycle with the victim in pursuit, and the latter, who was unable to catch the respondent, never saw his bicycle again. The victim's father observed the respondent riding a bicycle, which the father suspected was the bicycle, in the area several days later, and, after questioning respondent concerning the bicycle and losing contact with him on the street, he summoned the police who later determined respondent's identity through another youth with whom respondent had been seen. The respondent denied taking the bicycle, denied ever seeing the victim prior to the date of the hearing, and was unable to "quite remember" what he had been doing on the date of the theft. The court made a finding of delinquency and declared respondent a ward of the court. It was thereafter brought out at that hearing that respondent had had several prior referrals to the juvenile court, with varying dispositions of those referrals, but that at the time of the hearing respondent was under no supervision or probation as a result thereof. Respondent's mother, who was in attendance at that hearing, indicated that there was "nothing I can do" (apparently

concerning the boy's behavior) and the court continued respondent in custody. The matter was then set for December 5, 1973, for a social investigation report and a disposition.

At the December 5th dispositional hearing, at which respondent's father was in attendance, respondent's counsel represented to the court that, although a social investigation report had been made in the matter, it was not then immediately available since it had been mailed by counsel but had not yet been received by the addressee. Counsel then related in detail respondent's history, that it was respondent's fifth or sixth referral to the court, that he had a very poor record in school, and that his father did not think the boy could "carry through". After considerable discussion was had concerning what disposition to make of the matter (whether it would serve the best interests of respondent and of society to release him on probation or to commit him to the Department of Corrections), during which discussion respondent's father was uncertain as to what he thought should be done with the boy, the court noted that respondent had had several opportunities in the past for rehabilitation and that he had failed in that regard. Respondent was committed to the Department of Corrections, the mittimus to issue.

The issues raised by appellate counsel, which he states are without merit and will not support an appeal in this case, are: (a) whether the trial court properly ordered respondent held in custody an additional time without a showing of "good cause" by the State; (b) whether the police had probable cause to arrest respondent; (c) whether respondent was proven guilty of the offense of theft beyond a reasonable doubt; (d) whether the court properly proceeded to a disposition of the case without having before it a written social investigation report not more than 60 days old; and (e) whether the delinquency petition was in proper form and properly charged the offense of theft?

On the date that respondent was ordered by the court to be held in custody for additional time, it was not necessary that the State demonstrate good cause as a basis for such order, as had been the requirement of the statute prior to that date. Compare Ill. Rev. Stat. 1972 Supp., ch. 37, par. 704-2, and Ill. Rev. Stat. 1973, ch. 37, par. 704-2. The provision in the Juvenile Court Act requiring a showing of "good cause" in this regard was amended, effective October 1, 1973, by the current provision which contains no such requirement, and the order of the trial court keeping respondent in custody for additional time was entered subsequent to such effective date.

With respect to the question of whether there was probable cause to effect respondent's arrest, that question was neither raised by respondent's counsel below, nor does the instant record contain sufficient evidence upon which to base a contention in that regard on this appeal.

The third point advanced, relative to reasonable doubt, would likewise be without merit if raised as a ground for reversal on this appeal. The victim of the theft positively identified respondent as the person who aided in wresting the bicycle from him and who rode off with it thereafter; the victim's father observed respondent riding the bicycle in the immediate area of the theft just a few days thereafter. The testimony of a single witness, if positive and the witness credible, is sufficient to sustain a finding of guilt, although, as here, that testimony is contradicted by the accused. People v. Knowles (1970), 130 Ill. App. 2d 78, 264 N.E. 2d 716. The standard of proof to be applied in an adjudication of delinquency based upon criminal conduct has been satisfied. See e.g., In re Forrest (1973), 12 Ill. App. 3d 250, 298 N.E. 2d 197.

The trial court erred in proceeding to a disposition of the case without having before it a written social investigation

report as is specifically required by section 5-1 of the Juvenile Court Act before entering an order of commitment to the Department of Corrections. See Ill. Rev. Stat. 1973, ch. 37, par. 705-1. Such report does not appear in the instant record, and respondent's counsel represented to the court below that such report was not then immediately available. However, it has come to our attention that respondent was released on parole on July 31, 1974, from the custody of the Department of Corrections with respect to this matter; since the sole sanction which could be applied, upon a finding by this court on appeal that section 5-1 of the statute had been violated in that regard, would be a remandment of the cause for the trial court to consider such written report before entry of an order of commitment to the Department of Corrections, this matter is moot and would not present a viable issue on appeal.

Finally, the petition for adjudication of delinquency corresponds in all respects to the requirements of the Juvenile Court Act in that regard. See Ill. Rev. Stat. 1973, ch. 37, par. 704-1. Further, simply because respondent could have been charged with the offense of robbery, instead of theft, since the facts demonstrated that force was employed in the theft, such would not constitute a ground upon which an appeal could be based; robbery is the greater of the two offenses, carrying the greater penalty, and respondent could therefore not be heard to complain in that regard. See Ill. Rev. Stat. 1973, ch. 38, par. 16-1(a)(1), 16(e); par. 18-1(a), 18-1(b).

In pursuance of our responsibility under the Anders decision, this court has made an independent review of the instant record and has found two additional matters which could be raised as issues on appeal but which, in final analysis, would be without merit.

Section 5-2 of the Juvenile Court Act provides that a minor

thirteen years of age or older may be committed to the Department of Corrections if a term of incarceration is permitted by law for adults found guilty of the offense for which the minor was adjudicated delinquent and if the court makes certain findings, such as contained in the Dispositional Order herein. See Ill. Rev. Stat. 1973, ch. 37, par. 705-2(a)(5). The offense of theft, whether a first offense or a second or subsequent offense, is punishable by a term of incarceration under the Criminal Code. See Ill. Rev. Stat. 1973, ch. 38, par. 16-1(e)(1), and pars. 1005-8-3, 1005-8-1(b)(5), 1005-8-1(c)(5). The duration of respondent's custody by the Department of Corrections does not appear of record, and it cannot be determined whether the trial court had intended respondent to be held in custody for a period corresponding to the punishment prescribed for a first offense of theft or for a second or subsequent offense of theft.

Secondly, hearing on the petition to adjudicate delinquency was set within the term prescribed by the Juvenile Court Act for minors ordered held in detention. Ill. Rev. Stat. 1973, ch. 37, par. 704-2. Respondent's counsel requested that the hearing on the instant petition be set at a later date together with another (apparently unrelated) petition also then pending against respondent. Under the circumstances, neither matter would not provide a ground upon which to predicate an appeal in this case.

Upon a consideration of the matters advanced by appellate counsel and upon an independent review of the instant record by this court, we conclude that any grounds advanced to support this appeal would be without merit and that the appeal is therefore frivolous. The motion by the public defender of Cook County for leave to withdraw as appellate counsel is accordingly allowed and the judgment of the circuit court of Cook County is affirmed.

MOTION ALLOWED. JUDGMENT AFFIRMED.

17.19.14
J. H. C. Hill
H. H. C. Hill

JAN 16 1975

NO. 59647

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM THE
Plaintiff-Appellee,)	CIRCUIT COURT OF
v.)	COOK COUNTY
PAUL FRANKLIN,)	
Defendant-Appellant.)	HONORABLE
	SAUL A. EPTON
	PRESIDING.

PER CURIAM: First District, Fifth Division
Before Sullivan, P.J., Drucker and Lorenz, JJ.

On July 15, 1971, defendant entered a plea of guilty to an indictment charging him with one count of attempt murder and two counts of aggravated battery (Ill. Rev. Stat. 1969, pars. 8-4, 12-4.) and was sentenced to a term of eight to twenty years on the charge of attempt murder and five to eight years on each charge of aggravated battery, all sentences to run concurrently. Defendant appealed, arguing that the trial judge considered improper matters in determining his sentence. The State confessed error and this court vacated the sentence and remanded with instructions to resentence the defendant. On May 25, 1973, the trial court, after holding a hearing in aggravation and mitigation, sentenced the defendant to terms of five to eight years on the charge of attempt murder, and on each charge of aggravated battery, all sentences to run concurrently. Defendant now appeals from that sentence.

Defendant's first argument on appeal is that his sentence of five to eight years on the charge of attempt murder is excessive and should be reduced. While this court has the power to reduce sentences (Ill. Rev. Stat. 1969, ch. 110A, par. 615(b).), that power should be exercised with care and only where it is manifest in the record that the sentence is excessive. (People v. Fox, 48 Ill. 2d 239, 269 N.E.2d 720; People v. Conway, 3 Ill. App. 3d 69, 278 N.E.2d 852.) The trial judge who conducted the trial and the hearing in aggravation and mitigation is ordinarily in a better position than a reviewing court to determine the punishment to be imposed. People v. Winfield, 133 Ill. App. 3d 48, 272 N.E. 2d 848.

In the case at bar, the facts adduced at defendant's plea of guilty demonstrated that he had worked for the Melrose Park Car Wash from 1966 until February, 1971, when he was discharged for absenteeism. Subsequently, on February 10, 1971, the defendant returned to the car wash, produced a weapon and without provocation, shot and seriously injured the proprietor of the car wash. Defendant elected to be sentenced under the law in effect at the time of the commission of the crime, which provided that defendant could be imprisoned for an indeterminate period not to exceed twenty years (Ill. Rev. Stat. 1969, ch. 38, par. 8-4(c) (1).) The sentence imposed upon the defendant was within the statutory limits for the crime of attempt murder and a review of the record demonstrates that the sentence was not excessive.

Defendant's second argument on appeal is that he was improperly convicted of the two counts of aggravated battery since they arose out of the same course of conduct as the attempt murder charge. The State in its brief concedes that the facts which provided the basis for the attempt murder charge also provided the basis for the aggravated battery charges. Under these circumstances, defendant could be convicted of only one crime. (People v. Lilly, 56 Ill. 2d 493, 309 N.E.2d 1.) Defendant's convictions for aggravated battery are therefore vacated.

The judgment of the circuit court finding defendant guilty of attempt murder is affirmed, and the judgments finding defendant guilty on the two counts of aggravated battery are vacated.

Affirmed in part,
Vacated in part.

NOV 18 1974

59805

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Respondent-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
JOHNNY GRAYLE,	)	HON. L. SHELDON BROWN,
	)	Presiding.
Petitioner-Appellant.)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

Johnny Grayle (defendant) was convicted of arson. (Ill. Rev. Stat. 1967, ch. 38, par. 20-1(a).) He appealed and on October 5, 1971, this court affirmed his conviction. People v. Grayle, 2 Ill. App. 3d 4, 276 N.E.2d 98.

On April 27, 1972, he filed a petition, pro se, for post-conviction relief. (Ill. Rev. Stat. 1971, ch. 38, par. 122-1, et seq.) The People filed a motion to dismiss. After a hearing, the motion was granted and the petition dismissed. Defendant appeals.

In his brief in this court, defendant contends that his trial counsel in the post-conviction proceedings compromised his right to relief without express authority; counsel failed to amend the petition; and error occurred because defendant did not receive a copy of the State's motion to dismiss. The People respond that post-conviction relief is barred by principles of waiver and res judicata because of the prior appeal; defendant was not prejudiced by his alleged failure to receive a copy of the State's motion; and there is no legal requirement that appointed counsel, who finds no basis for amendment of a post-conviction petition, must obtain consent from his client before filing a certificate under Supreme Court Rule 651(c), 50 Ill. 2d R. 651(c).

It is readily apparent that the pro se petition contains no facts which tend to raise any substantial constitutional question. The petition merely contains conclusions to the effect that the trial court overruled defendant's defense of alibi "without ascertaining whether it was valid" and that the trial court sustained credibility of certain witnesses. There is also a statement that the defendant was denied due process and equal protection of the law. The State's motion to dismiss set forth that the petition fails to raise any constitutional question, that it was barred by res judicata, and that it was not sufficient to require a hearing.

Sometime after the filing of this motion, counsel of record for defendant, a public defender of Cook County, filed a sworn certificate under Supreme Court Rule 651(c), 50 Ill. 2d R. 651(c). Counsel stated that he and other public defenders consulted with petitioner "by mail on numerous occasions and in person on July 12, 1973" and read and examined the report of proceedings at the trial. The certificate stated the belief of counsel that the petition adequately and fully reflects all possible constitutional claims which petitioner might raise under the post-conviction law.

We conclude of necessity that the petition for post-conviction relief is legally inadequate. The petition contains only mere conclusions which, standing alone, are not sufficient to require a hearing under the post-conviction law. (People v. Skorusa, 55 Ill. 2d 577, 585, 586, 304 N.E.2d 630.) Furthermore, a defendant who brings a post-conviction petition is not entitled to an evidentiary hearing as a matter of right. On the contrary, the Act contemplates dismissal of a nonmeritorious petition. People v. Collins, 39 Ill. 2d 286, 235 N.E.2d 570.

These principles are all applicable to the case before us where the petition, on its face, is totally lacking in merit. Counsel for defendant comments that if his client had received a

copy of the motion to dismiss, he might have attempted to cure the deficiencies of the pro se petition. But, the record shows here that counsel for defendant consulted with him in person after the filing of the motion to dismiss and that this counsel and other attorneys had communicated with the defendant by mail. Despite all of these efforts, no statement is made regarding how or in what manner this petition could possibly be given life by the process of amendment. Without some type of showing as to the existence of some pertinent facts, the failure to amend this petition cannot be the subject of criticism. People v. Bowman, 55 Ill. 2d 138, 140, 302 N.E.2d 318.

In People v. Wollenberg, 9 Ill. App. 3d 1028, 1030, 293 N.E. 2d 728, leave to appeal denied 54 Ill. 2d 595, this court disposed of a similar situation by the statement that post-conviction counsel there "was appointed as a lawyer, not as a conjurer,***." That remark is applicable and dispositive in the case before us. The certificate of counsel above described is ample to show a careful and conscientious effort in behalf of this defendant. (See People v. Harris, 50 Ill. 2d 31, 276 N.E.2d 327.) Dismissal of the petition must necessarily be affirmed.

JUDGMENT AFFIRMED.

EGAN, P. J., and HALLETT, J., concur.

(Abstract Only).

JAN 16 1975

No. 60379

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,)
)
 v.)
)
 DAYTON MARSHALL,)
)
 Defendant-Appellant.)

APPEAL FROM THE
 CIRCUIT COURT OF
 COOK COUNTY

HONORABLE
 DANIEL COMAN,
 PRESIDING.

PER CURIAM: First District, Fifth Division.

Before Sullivan, P.J., Drucker and Lorenz, JJ.

Defendant was found guilty after a bench trial of the crime of theft (Ill. Rev. Stat. 1973, ch. 38, par. 16-1(a)(1).) and was sentenced to probation for a period of one year. He appeals arguing that the evidence was insufficient to establish his guilt beyond a reasonable doubt.

The evidence pertinent to this appeal is summarized. Charles Grunhard, a Chicago police officer, testified that on December 27, 1973, he executed a search warrant issued for the person of Dayton Marshall and the premises at 11342 South Homewood, Chicago, Illinois. On an enclosed back porch at that address he found a Chicago Police Department helmet. The only person present at the time was Herschel Whaley. There was only one door leading to the porch and that door opened from the rear bedroom. Whaley told Officer Grunhard that the back bedroom was defendant's bedroom. In the rear bedroom the police found mail addressed to defendant and other articles belonging to him. On December 28, 1973, Officer Grunhard placed defendant under arrest.

Chicago police officer, Edward Ojer, testified that in October, 1971, he was issued a helmet by the Chicago Police Department. The helmet was in the trunk of his automobile which was stolen on July 10, 1973. He identified his helmet as the one found in the apartment at 11342 South Homewood.

Herschel Whaley testified that he lived in the apartment at 11342 South Homewood, Chicago, Illinois. On December 27, 1973, he was

present in the apartment when Chicago police officers executed a search warrant. Whaley testified that several people lived in the apartment, each having access to the rear porch. He stated that he never saw the helmet prior to the search by the police officers. He described the rear porch as a junk room and testified that on December 27, 1973, Defendant was living in the rear bedroom of the apartment.

Defendant testified that on December 27, 1973, he lived at 1318 West 112th Place, Chicago, Illinois, and that he would occasionally use the rear bedroom at 11342 South Homewood to entertain his girl friends. Defendant stated that he never went onto the rear porch.

OPINION

Defendant's only argument on appeal is that the evidence was insufficient to establish his guilt beyond a reasonable doubt. Specifically, defendant argues that the evidence failed to establish that he exerted unauthorized control over the helmet. Defendant was convicted of theft which is defined by section 16-1(a)(1) of the Criminal Code (Ill. Rev. Stat. 1973, ch. 38, par. 16-1(a)(1).):

"A person commits theft when he knowingly:

(a) Obtains or exerts unauthorized control over property of the owner; *** and

(1) Intends to deprive the owner permanently of the use or benefit of the property."

To sustain a conviction under this statute, it is necessary to show that defendant exerted unauthorized control through possession of the property intending to permanently deprive the owner of its use. (People v. Helm, 10 Ill. App.3d 643; 295 N.E.2d 78.) However, the possession must be exclusive in defendant. Where the property is found in a place where another person could have had access thereto as well as defendant, it cannot be said that the property is in the exclusive possession of defendant. People v. Davis, 69 Ill. App. 2d 120, 216 N.E.2d 490.

In the case at bar, the evidence adduced at trial demonstrated that on December 27, 1973, Chicago police officers executed a search

warrant for defendant in the premises at 11342 South Homewood, Chicago, Illinois. At the time of the execution of the warrant, defendant was not on the premises. In searching the rear porch of those premises, police discovered a Chicago Police Department helmet which had been stolen from Officer Ojer several months earlier. The porch was accessible to all of the people who lived in the apartment and was used as a junk room. The only evidence connecting defendant to the helmet was that defendant occupied a bedroom adjoining the rear porch where the helmet was found, and that he had equal access to the porch with several other persons. There was no direct evidence showing that defendant had ever seen the helmet or was aware of its presence on the back porch. Under these circumstances we conclude that the evidence adduced at trial was insufficient to show that defendant was in exclusive possession of the helmet.

The judgment of the circuit court is reversed.

Reversed.

[PUBLISH ABSTRACT ONLY.]

73-181

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable L.L. RECHENMACHER, Justice
LOREN J. STROTZ , Clerk Pro Tem
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
November 27, 1974 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF THE STATE OF ILLINOIS
SECOND JUDICIAL DISTRICT

WALTER H. SMITH and)	
RITA M. SMITH,)	
)	
Plaintiffs-Appellees,	)	Appeal from the
	)	Circuit Court for the
v.	)	16th Judicial Circuit,
	)	Kendall County,
NATIONAL DRAG RACING ENTERPRISES,	)	Illinois.
INC., an Illinois Corporation,)	
)	
Defendant-Appellant.)	

MR. JUSTICE RECHENMACHER delivered the opinion of the court:

This is an appeal from an order of the circuit court of Kendall County wherein the court denied defendant's motion to vacate the default judgment previously entered in plaintiffs' favor.

The plaintiffs were the owners of and were previously the operators of an automobile racing strip known as "Oswego Dragways". They entered into a lease with defendant under the terms of which the defendant leased "Oswego Dragways" from plaintiffs and operated this strip. The initial term began on June 22, 1965 for 3 years with an option to extend it for 7 additional years, subject to certain conditions. According to the complaint, defendant breached the terms of the lease with regard to rental and other matters.

The complaint was filed on February 9, 1973 in 2 counts, Count I for rescission and cancellation of a lease between plaintiffs and defendant and for damages for breach of the lease agreement, and Count II for damages under the Illinois Anti-Trust Act. The complaint was duly served on the

defendant on February 9, 1973, answer being due on or before March 12, 1973. The defendant did not refer the summons to counsel until March 7, 1973. On March 7th defendant's counsel, Montgomery, who officed in Chicago, put in a phone call to Mr. Murphy, plaintiffs' counsel in Aurora, and Mr. Murphy being out of town, Montgomery left word with Murphy's secretary that he was calling to request a 30 day extension of time for the filing of an answer in this case and he gave the secretary his name and telephone number.

On March 13, 1973 Mr. Murphy, without having acknowledged Montgomery's phone message, appeared in Judge Sears' court and requested a default judgment be entered in the case. It was entered forthwith. Attorney Montgomery learned of the entry of the default judgment the next day, that is March 14th, whereupon he immediately called Attorney Murphy and advised him that a motion would be presented to vacate the default judgment and for an extension of time to answer the complaint.

Defendant's motion to vacate the default judgment together with defense attorney's affidavit stating that a meritorious defense existed, were received by the clerk of the court on March 16th, together with notice stating that defendant's motion to vacate the judgment would be presented in court on March 19th.

On March 19th the matter came on for hearing on defendant's motion to vacate the default judgment entered March 13th, at which time the plaintiffs filed a motion to strike on the ground that defendant had not shown a meritorious defense. The trial court ruled that an affidavit of the facts showing a meritorious defense was required, ordered the defendant's affidavit stricken and continued the matter until the

next day to allow the defendant to file an affidavit going to the merits of the defense. Defense counsel the next day filed an "additional affidavit" alleging facts controverting the allegations of the complaint. Objections were filed by plaintiffs' counsel and the trial judge struck the additional affidavit as not being sufficient to show a meritorious defense and denied defendant's request for leave to file an additional affidavit, thus in effect denying defendant's motion to vacate the default judgment. The judge, on March 28th, entered a supplemental order vacating any default as to Count II of the complaint but denying defendant's motion to vacate the default judgment as to Count I. The original order of default entered on March 13th was amended nunc pro tunc by adding a finding that there was "no just reason for delaying enforcement or appeal" of that order.

The defendant appeals on the grounds that the trial court abused its discretion in denying the motion to vacate the default judgment made within 3 days of the order of default and erred in its ruling that a motion to vacate a default judgment made within 30 days of its entry requires an affidavit of meritorious defense and in its ruling that the "additional affidavit" of defense counsel did not go to the merits of the defense, if such an affidavit was required.

It is conceded by plaintiffs that it is common practice for the trial court to vacate a default judgment entered ex parte without an affidavit asserting a meritorious defense where the motion to vacate is made within 30 days of its entry. While formerly, as pointed out by J. Moran in Knight v. Kenilworth Ins. Co. (1971), 2 Ill.App.3d 493, it was necessary that a meritorious defense and good excuse be shown, these

showings are no longer necessary, now being considered merely as factors, together with the possible hardship to the plaintiff, which the court may take into account "in resolving the more basic determination of dispensing justice between the parties."

This question was also discussed by this court in Megan v. L.B. Foster Co. (1971), 1 Ill.App.3d 1036,¹⁰³⁹ where J. Guild said:

"A motion to vacate a default judgment is addressed to the sound discretion of the trial court; only in the abuse of that discretion will this court interfere. [citation] However, in view of the circumstances outlined above it would appear that furtherance of justice requires that the appellant have its day in court."

The cases cited by the court in this opinion stress the idea that the ends of justice are usually better served by a trial on the merits than by a default judgment. While default judgments are often entered for obvious reasons in the necessary control and discipline of court procedure, they are not allowed to stand where to do so would create an unjust result, which might be avoided by a trial on the merits of the case.

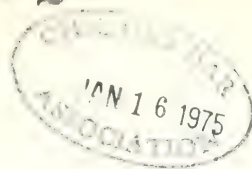
In the case before us it is apparent from the pleadings, briefs and oral argument of counsel that there are issues of fact and law which should be heard and resolved in order to reach a just result in the controversy which has arisen between the parties. We do not feel that the circumstances of this case are such as to justify aborting the resolution of the genuine issues between them through default. It is true that defendant was not diligent in referring his interests to counsel but there may have been reasons for this not disclosed by the record and once it was given to defense counsel he acted with due diligence and this was acknowledged by counsel for plaintiffs.

Certainly circumstances may exist from time to time which justify the trial court in refusing to vacate a default judgment, even during term time, but such circumstances are not present in this case. To affirm the ruling of the trial court here would be manifestly against the modern trend of the cases as indicated in the Supreme Court case of People ex rel. Reid v. Adkins (1971), 48 Ill.2d 402, and the 1st Appellate District case of Accurate Home Supply, Inc. v. Malpede (1973), 12 Ill. App.3d 749, and would be directly contrary to this court's decisions in the Knight and Megan cases cited above, since the circumstances here do not disclose any significant differences from those cases.

The judgment of the trial court is therefore reversed with directions to vacate the default judgment entered against the defendant and to allow the defendant to plead its defense so that the matter may proceed to a trial on the merits.

Reversed with directions.

GUILD and SEIDENFELD, JJ., concur.



59250

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Respondent-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
vs.)	
	)	HON. FRANK J. WILSON,
RONALD BURBANK,	)	Presiding
)	
Petitioner-Appellant.)	

PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Before Burke, Goldberg and Hallett, JJ.

Ronald Burbank (petitioner) was found guilty after a jury trial of the offense of murder and was sentenced to a term of 100 years to 150 years; the judgment was affirmed on direct appeal to the Illinois Supreme Court in People v. Burbank, 53 Ill. 2d 261, 291 N.E.2d 161. His petition for relief under the Illinois Post-Conviction Hearing Act was dismissed on motion of the respondent without an evidentiary hearing and he appeals. Ill. Rev. Stat. 1971, ch. 38, pars. 122-1 et seq.

The unamended pro se post-conviction petition raises 15 grounds for relief, more than half of which were expressly considered and disposed of by the Supreme Court in the direct appeal. The petition is not supported by affidavit, as required by section 2 of the Post-Conviction Hearing Act (Ill. Rev. Stat. 1971, ch. 38, par. 122-2); none of the allegations of the violation of petitioner's constitutional rights is amplified by an evidentiary statement, nor is the failure to supply such evidentiary matters otherwise accounted for by petitioner. Petitioner's trial counsel in these proceedings has filed an affidavit that he consulted with petitioner concerning the allegations in the

petition, both by mail and in person; that he review the transcript in the case; and that it was unnecessary to amend or alter the pro se petition in any manner.

The sole grounds advanced on appeal are that the trial court erred in dismissing the petition without an evidentiary hearing since the petition alleged that black persons were excluded from the jury and since the sentence imposed constituted cruel and unusual punishment, both being a violation of his constitutional rights.

As noted, the petition fails to amplify the allegations with evidentiary documentation and is further not supported by affidavit. There was consequently nothing before the trial court at the hearing on respondent's motion to dismiss the petition from which the court could determine that an evidentiary hearing was necessary. (See People v. Curtis, 41 Ill. 2d 147, 242 N.E.2d 201.) Further, this question could have been raised on the direct appeal; it was not so raised and is therefore waived. People v. Somerville, 42 Ill. 2d 1, 245 N.E.2d 461.

The second point raised by petitioner, that the sentence imposed amounted to cruel and unusual punishment, is barred by the doctrine of res judicata. The sentence imposed was expressly considered by the Supreme Court on the direct appeal and was found to have been within the law. Merely clothing the argument in a constitutional veil does not require a reconsideration of the same matter. People v. Cox, 34 Ill. 2d 66, 213 N.E.2d 524.

For these reasons the judgment of the circuit court of Cook County dismissing the post-conviction petition without an evidentiary hearing is affirmed.

JUDGMENT AFFIRMED



3D

24 I.A. 129

59831

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
vs.	)	COOK COUNTY
)	
ANTHONY NIGHTENGALE,	)	HON. ROBERT J. COLLINS,
	)	Presiding
)	
Defendant-Appellant.)	

MR. JUSTICE BURKE delivered the opinion of the court:

Anthony Nightengale, the defendant, was found guilty after a jury trial in the circuit court of Cook County of the crime of armed robbery in violation of Section 18-2 of the Criminal Code. (Ill. Rev. Stat. 1969, ch. 38, par. 18-2.) The defendant was sentenced to a term of four to twelve years. The defendant appeals from the verdict contending that: (1) the evidence was insufficient to establish guilt beyond a reasonable doubt; (2) the prosecutor's remarks in the closing argument commenting on the defendant's failure to produce certain alibi witnesses was reversible error; (3) the denial of a motion to suppress an in-court identification of the defendant was error; and (4) the denial of a motion to quash the defendant's arrest was error.

A prosecution witness, George Fernandez, testified that on September 11, 1970, he was employed at the Harper Court shopping center as a security guard. At approximately 4:30 P.M. that day, while Mr. Fernandez was on duty, he encountered a man whom he later identified as the defendant. Mr. Fernandez admonished this man for drinking. The man left but said he would be back. This same man returned that afternoon shortly before 6 P.M. and confronted Mr. Fernandez while he was standing with a Mrs. Jean Orlikoff. The man pulled a revolver from a shopping bag and demanded that Mr. Fernandez drop his belt and gun. Mr. Fernandez did so and the man picked the items up and placed them in his shopping bag. Mr. Fernandez testified that it was

a bright, sunny day, that the assailant was only five or six feet from him, and that he took a good look at his assailant's face. Mr. Fernandez said that the second encounter involving the robbery lasted five or ten minutes. Jean Orlikoff's testimony was substantially the same as Mr. Fernandez'. However, before the robbery was concluded, Mrs. Orlikoff slipped away from the robbery scene to call the police. She observed the rest of the event from a store window approximately 100 feet from where the assailant was standing.

Mr. Fernandez testified that he had seen his assailant several times prior to the day of the robbery but did not then know his name. Both Mr. Fernandez and Mrs. Orlikoff identified the defendant, Anthony Nightengale, in court as being the man who robbed Mr. Fernandez of his belt and gun.

Mr. Fernandez testified that about two months later, on November 7, 1970, he saw his assailant at a car wash. He immediately flagged down a police car and told the officer he had just seen the man who had "stuck" him up. Mr. Fernandez then pointed out that man, who was the defendant, Anthony Nightengale, and the officer placed Mr. Nightengale under arrest. Mr. Fernandez, Anthony Nightengale and the arresting officer, Thomas Porter, then all rode to the police station in officer Porter's squad car. Mr. Fernandez and Mr. Nightengale were in the same room at the police station for about one to one-and-one-half hours after the arrest.

Mr. Fernandez told the police that the belt that Anthony Nightengale was wearing looked like the belt he had taken from him. Mr. Fernandez said his belt contained the initials "G. F." scratched on the back and had two extra belt buckle holes punched in it. The officers took the belt from Mr. Nightengale and found the initials and the extra holes. Although Mr. Fernandez did not examine the belt for these characteristics at the police station, he did identify the belt as

his own at the trial and noted the initials were faded but still visible.

Both the defendant and his wife, Sally Nightengale, testified that they were at their aunt's house in Chicago at the time and date the robbery took place. They testified that their aunt, another adult, the aunt's children and the defendant's children were present at the time. The defendant's wife testified on direct examination that her aunt was unable to be in court that day because she had recently had several strokes. The other potential alibi witnesses also did not appear and the defendant made no comment as to why they were not in court.

The defendant testified that the belt was his, he had bought it at a certain store in Chicago, he had placed several extra notches in it, and that there were no initials scratched in it.

The defendant first contends that his guilt was not proven beyond a reasonable doubt. His argument centers around the ownership of the belt and whether the initials "G. F." were still visible on its backside. Mr. Fernandez and two police officers who were at the police station when the belt was taken from Anthony Nightengale all identified the belt in court and testified that they could still make out the initials "G. F." on its backside although the initials were faded. Furthermore, the belt was entered into evidence, and if the jury had any doubt as to the initials' existence, they could examine the belt. It was clearly within the jury's province to determine whether these initials existed and whose belt it was. There was more than adequate evidence for the jury to find that the belt was the one taken from Mr. Fernandez on the day of the robbery.

The identification of the belt, however, was not crucial to the prosecution's case. Positive identification of the defendant was made by two eye witnesses, one of whom testified he had seen the defendant several times prior to the robbery. Those identifications alone would have been sufficient evidence for the jury to base its guilty verdict upon. The testimony of a single witness who viewed the defendant under circumstances which would permit a positive identification is sufficient to uphold a conviction. (People v. Stringer, 52 Ill. 2d 564, 289 N.E.2d 631; People v. Watkins, 46 Ill. 2d 273, 263 N.E.2d 115.) The fact that the defendant presents alibi witnesses does not in itself create a reasonable doubt. The credibility of the alibi witnesses is a question for the jury. (People v. Hayes, 14 Ill. App. 3d 248, 302 N.E.2d 411.) The positive testimony of even one witness is sufficient to convict a defendant even though there may be a greater number of alibi witnesses. (People v. Catlett, 48 Ill. 2d 56, 268 N.E.2d 378; People v. Setzke, 22 Ill. 2d 582, 177 N.E.2d 168.) The prosecution in our case presented the positive testimony of two eye witnesses who identified the defendant as the person who committed the robbery. Both witnesses had ample opportunity to view their assailant. The jury could properly find that the defendant was guilty beyond a reasonable doubt.

The defendant next contends that the prosecutor made a remark in his closing argument concerning the defendant's failure to bring in the remainder of his alleged alibi witnesses which was reversible error. The defendant and his wife had testified on direct examination that during the time the robbery took place they were at their aunt's home with certain other specified persons. None of these other persons testified. The defendant's wife stated that their aunt was at home rather than in court the day of the trial because their aunt had recently had several strokes. In referring to the defendant's alibi of

being at his aunt's home the prosecutor in his closing argument stated:

"Ladies and gentlemen, there were at that house on that day, seven people during the period of a day, and at least five people that were there at the time that this incident happened, or supposedly happened, who were with Mr. Nightingale [sic] at the time that this incident happened or were supposedly with Mr. Nightingale [sic] when this incident happened.

"There was one person with Mr. Fernandez, and that person testified."

The defendant's attorney at the trial immediately objected and the court sustained this objection and instructed the jury to disregard the prosecutor's statement. The defendant argues that this statement was an inference by the prosecutor to the jury that the defendant should have brought in the remainder of his alibi witnesses. We will assume this was so inferred while considering this issue.

Although it is error for a prosecutor to comment on the defendant's failure to produce certain witnesses where it is within the State's power to call such witnesses (People v. Munday, 280 Ill. 32, 117 N.E. 286; People v. Rubin, 366 Ill. 195, 7 N.E.2d 890), an exception has been made where the defendant himself has injected certain potential alibi witnesses into the case by his own testimony. (People v. Swift, 319 Ill. 359, 150 N.E. 263; People v. Durso, 40 Ill. 2d 242, 239 N.E.2d 842.) However, it has been recently noted that the rule that a prosecutor may comment on the defendant's failure to produce alleged alibi witnesses is in conflict. (People v. Nilsson, 44 Ill. 2d 244, 255 N.E.2d 432.) Even if the prosecutor's comment was improper, we find that it was harmless error. The defendant, in his own case, attempted to explain the absence of one of his alibi witnesses. Furthermore, the trial court had instructed the jury to disregard the prosecutor's statement. In light of these facts, in addition to the strong testimony of

two eye witnesses to the robbery, we find the prosecutor's comments were at most harmless error. Such remarks have been commonly held to have been harmless error. See People v. Canale, 52 Ill. 2d 107, 285 N.E.2d 133; People v. Nilsson, 44 Ill. 2d 244, 255 N.E.2d 432; People v. Langzem, 307 Ill. 56, 138 N.E. 222.

The defendant's third contention is that the trial court erred when it denied the defendant's pretrial motion to suppress any in-court identification of the defendant. The defendant argues that after he was arrested the police unnecessarily kept the defendant and his accuser together for a considerable period of time. The defendant contends that this constituted a highly suggestive pretrial confrontation which tainted any subsequent in-court identification by Mr. Fernandez.

The law concerning suggestive pretrial confrontations between a defendant and those who later identify a defendant at trial as the offender is set forth in People v. Blumenshine, 42 Ill. 2d 508, 250 N.E.2d 152. If such a confrontation is unnecessarily suggestive and conducive to a mistaken identification, it is a violation of a defendant's due process. However, such a suggestive confrontation is cured if a later identification would be clearly based on an origin which is independent of the suggestive confrontation. Blumenshine then went on to list what may constitute such independent origins. This list included situations where the witness had an excellent opportunity to observe the defendant at the time of the crime and where the witness had known the defendant prior to the crime. The fact that the witness had known the defendant before (People v. Robinson, 42 Ill. 2d 371, 247 N.E.2d 898), and the fact that the witness had observed the offender for five to ten minutes at the scene of the crime (People v. White, 116 Ill. App. 2d 180, 253 N.E.2d 654), have been held to constitute sufficient independent origins for in-court identifications in other cases.

Prior to Mr. Fernandez being placed with the defendant after the defendant's arrest, Mr. Fernandez had considerable opportunity to observe the defendant. Mr. Fernandez testified during the hearing on the pretrial motion to quash his in-court identification that he had seen his assailant several times prior to the day of the robbery. Mr. Fernandez also saw his assailant twice on the day of the robbery; both when Mr. Fernandez admonished the assailant for drinking and later when his assailant returned to rob him. It was broad daylight and the witness testified he observed his assailant for at least five minutes while the robbery was taking place. Finally, less than two months later this witness recognized the defendant on the street as his assailant. Clearly, Mr. Fernandez had adequate opportunity to properly identify the defendant as his assailant. The failure to separate Mr. Fernandez from the defendant after Mr. Fernandez had pointed him out on the street was in no way prejudicial to the defendant's rights.

The fact that no line-up was held also did not violate Anthony Nightengale's rights. There is no rule that a defendant should be afforded a line-up in all cases. (People ex rel. Blassick v. Callahan, 50 Ill. 2d 330, 279 N.E.2d 1; People v. Finch, 47 Ill. 2d 425, 266 N.E.2d 197.) A line-up in our case would have served no purpose. The witness had picked the defendant out on the street and hailed a police officer to arrest him. To stage a line-up for the witness to again pick out the man he had just identified would have been pointless.

Finally, the defendant contends that the arresting officer lacked reasonable grounds to believe that the defendant had committed an offense when the arrest was made. (Ill. Rev. Stat. 1969, ch. 38, par. 107-2(c).) At the pretrial hearing it was found that the arresting officer had placed the defendant under arrest after he was approached by a man on the street who announced he had just seen a man who had robbed him some time in

the past and who pointed out the defendant while exclaiming:
"That's the man."

Where an arrestee has been pointed out by the victim (People v. Branczтет, 59 Ill. App. 2d 381, 208 N.E.2d 416) or identified by the victim (People v. Palmer, 31 Ill. 2d 58, 198 N.E.2d 839), reasonable grounds for an arrest have been found. Furthermore, the requirement of prior reliability applied to professional informers does not apply to ordinary citizens. (People v. Hester, 39 Ill. 2d 489, 237 N.E.2d 466.) The arresting officer clearly had reasonable grounds to arrest the defendant in our case.

The judgment is affirmed.

JUDGMENT AFFIRMED

EGAN, P.J. and HALLETT, J., concur.



11-5-17-14

24 I.A.^{3D} 137

No. 59118

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	OF COOK COUNTY
)	
v.)	
)	
GLENN BENES,	)	HONORABLE
	)	ROBERT A. MEIER, III
Defendant-Appellant.)	)	PRESIDING

PER CURIAM (First District, Fifth Division)

SULLIVAN, P.J., DRUCKER, J. and LORENZ, J. participating.

Defendant was charged with burglary in violation of Section 19-1 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 19-1). He entered a plea of guilty and was sentenced to a term of two to five years.

On appeal, he contends the trial court failed to comply with Supreme Court Rule 402 (Ill. Rev. Stat. 1971, ch. 110A, par. 402) in accepting his plea of guilty and that his minimum sentence must be reduced under the Unified Code of Corrections.

On November 8, 1972, when defendant's case was called, his privately retained defense counsel informed the trial judge that defendant wished to withdraw his previously entered plea of not guilty and enter a plea of guilty. The trial judge then informed defendant that (1) he was charged with burglary, which was punishable by imprisonment in the penitentiary for a term of not less than one year nor more than life; (2) he had a right to plead not guilty and to persist in that plea or to plead guilty; (3) upon a plea of guilty, there would not be a trial of any type and that he would waive his right to a trial by jury and his right to confront the witnesses against him. Defendant then informed the court he was pleading guilty voluntarily and of his own free will. The facts which provided the basis for the charge were stipulated to by the parties following which defendant persisted in his plea of guilty, which was then accepted.

Defendant initially contends that the trial court failed to determine that he understood the admonishments given him. In

People v. Mendoza, 48 Ill.2d 371, 270 N.E.2d 30, the Supreme Court held the fact that a defendant was not specifically admonished by the trial court as to each and every consequence of his plea of guilty does not demonstrate that he was, in fact, unaware of the consequences. In the case at bar, there is nothing in the record which would indicate that the defendant's plea of guilty was not voluntarily and understandingly entered. When defendant's case was called, privately retained counsel in defendant's presence informed the trial judge that defendant wished to enter a plea of guilty. The trial judge specifically informed defendant that he was charged with the crime of burglary, and he was advised of the maximum and minimum possible statutory penalties for the crime of burglary. He was also advised that he had a right to plead not guilty and to persist in that plea, that by pleading guilty he would waive his right to a trial by jury and his right to confront witnesses, and that upon a plea of guilty there would not be a trial of any type. Defendant then stated he was pleading guilty voluntarily and of his own free will. These admonishments by the trial judge were sufficient to constitute substantial compliance with Supreme Court Rule 402. People v. Krantz, ___ Ill.2d ___, ___ N.E.2d ___ (Nos. 46078, 46252 Cons., Sept. 27, 1974); People v. Anderson, 10 Ill.App.3d 558, 294 N.E.2d 707.

Defendant also maintains the trial judge failed to properly admonish him as to the nature of the charge. The rule that a defendant be advised of the nature of the charge against him does not require the trial court to recite all of the facts which constitute the offense. This court has held that the admonishment of the crime by name is sufficient to apprise the defendant of the nature of the crime charged. People v. Carrion, 21 Ill.App.3d 195, 315 N.E.2d 251; People v. Tennyson, 9 Ill.App.3d 329, 292 N.E.2d 223; People v. Wintersmith, 9 Ill.App.3d 327, 292 N.E.2d 220; People v. Wright, 2 Ill.App.3d 304, 275 N.E.2d 735; People v. Rosario, 2 Ill.App.3d 231, 276 N.E.2d 473; People v. Palmer, 1 Ill. App.3d 492, 274 N.E.2d 910; People v. Carter, 107 Ill.App.2d 474,

246 N.E.2d 320, and that the entire record may be considered in determining whether or not there was an understanding by the accused of the nature of the charge. People v. Harden, 38 Ill.2d 559, aff'g. 78 Ill.App.2d 431.

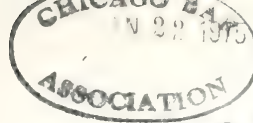
In the case at bar, defendant was specifically admonished by the trial judge that he was charged with the crime of burglary and advised of the possible statutory penalty for this offense. There is no contention that the facts which were stipulated to by the parties did not demonstrate defendant's guilt. Under these circumstances, we conclude that the defendant was sufficiently informed as to the nature of the charge to which he was entering a plea of guilty.

Finally, defendant argues that his minimum sentence must be reduced under the Unified Code of Corrections. Defendant was convicted of burglary, which under the Unified Code of Corrections is a Class 2 felony (Ill. Rev. Stat. 1973, ch. 38, par. 19-1.) The Code provides that for a Class 2 felony the maximum penalty shall be any term in excess of one year and not exceeding 20 years (Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-1(b)(3)) and that the minimum term shall be one year unless the court, having regard to the nature and circumstances of the offense and the history and character of the defendant, sets a higher minimum term which shall not be greater than one-third of the maximum term (Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-1(c)(3)). Here, defendant's minimum sentence of two years is in excess of one-third of the five year maximum and therefore must be reduced to a term of one year eight months.

Accordingly, the minimum sentence is reduced to a term of one year and eight months, and the judgment, as so modified, is affirmed.

Affirmed as modified.

Publish abstract only.


 3D
 24 I.A. 138

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

JAMES SMITH,

Defendant-Appellant.

)
) APPEAL FROM THE
) CIRCUIT COURT OF
) COOK COUNTY
)
) HON. EARL E. STRAYHORN,
) JUDGE PRESIDING.

Mr. JUSTICE BURMAN delivered the opinion of the court.

Defendant, James Smith, was charged in two separate indictments with the unlawful possession of heroin. On January 6, 1972, he pleaded guilty to both charges and was placed on five years probation. On March 15, 1973, defendant's probation was revoked upon a showing that he had been found guilty of theft on January 12, 1973. After a hearing in aggravation and mitigation, the court sentenced him to serve concurrent three to nine year terms in the penitentiary on each of his guilty pleas. On appeal, defendant solely contends that the sentence is excessive.

At the time defendant pleaded guilty, the offense was punishable under the Controlled Substances Act by a term of one to eight years in the penitentiary. (Ill.Rev.Stat.1971, Ch.56 1/2, par.1402.) Prior to the revocation of defendant's probation, the statute was amended making the offense a Class 3 felony punishable by a maximum term of ten years. (Ill.Rev.Stat.1972 Supp., Ch.38, par.1005-8-1.) At trial defendant was sentenced to serve three to nine years in accordance with the amended penal provisions of the Controlled Substances Act.

Both parties recognize the law to be that the subsequent statutory amendment can be applied only when the penalty thereunder is less stringent than that in effect at the time the prosecution is commenced. People v. Chupich, 53 Ill.2d 572. Accordingly, we hold that defendant's sentence must be vacated, since it exceeds the maximum term of eight years applicable at the time of prosecution.

Defendant requests that we reduce his maximum sentence to a term of seven years. He notes that the trial judge did not impose the maximum penalty authorized under the amended Act, but rather imposed a sentence of one year less. Defendant, therefore, argues that the maximum sentence of eight years is inappropriate and should be reduced by one year.

We note that although the Appellate Court is vested with the power to reduce a sentence, this authority should be used sparingly and only when necessary to rectify an injustice. Abernathy v. People, 123 Ill.App.2d 263, 259 N.E.2d 363. We have observed that typically, a trial court is in a superior position to a reviewing court to determine an appropriate sentence through the exercise of sound judicial discretion. People v. Crews, 38 Ill.2d 331. Accordingly, we remand this matter to the trial court for the imposition of a maximum sentence not to exceed eight years.

Defendant additionally contends that the minimum term of three years is excessive. Section 1601 of the Controlled Substances Act provides that:

"*** If the offense being prosecuted would be a violation of this Act, *** then for purposes of penalty the penalties under this Act apply if they are less than under the prior law upon which the prosecution was commenced."

Under the Act, the minimum sentence for a Class 3 felony may not exceed one-third of the maximum sentence. Since the application of this penalty provision would result in a lesser minimum sentence than that imposed by the trial court, defendant's minimum sentence should be reduced to no more than one-third of his maximum term.

The judgment of the circuit court is affirmed, and the cause is remanded for resentencing.

AFFIRMED and REMANDED with directions.

Dieringer and Johnson,

JJ., concur.

(Abstract only).

WILLIAM HENDERSON,	)	APPEAL FROM
	)	CIRCUIT COURT,
Plaintiff-Appellee,	)	COOK COUNTY.
)	
v.)	
)	
IDA BACKUS,	)	HONORABLE
	)	ROBERT E. MCAULIFFE,
Defendant-Appellant.	)	PRESIDING.

Mr. JUSTICE HALLETT delivered the opinion of the court:

Defendant, Ida Backus, appeals from a judgment entered on a jury verdict awarding \$15,000.00 to the plaintiff, William Henderson. The suit was the result of an accident between defendant's and plaintiff's automobiles which occurred on May 13, 1966, within the intersection formed by Green Bay Road and Forest Avenue in Winnetka. The facts are not really in dispute. Plaintiff was traveling south on Green Bay Road on a rainy afternoon when the roadway was wet and the traffic was light. He slowed, activated his turn signal, checked for on-coming traffic, and seeing none, turned left (east) onto Forest Avenue. Plaintiff was unable to clear the intersection because a car turning in front of him stalled and blocked his way. A portion of plaintiff's car was still within the intersection and was struck by defendant's car, which was traveling northbound on Green Bay Road.

Defendant asks that we reverse and remand the cause for a new trial on the ground that the court committed prejudicial error in allowing plaintiff's counsel to misstate the law relating to the right-of-way under the so-called left-turn statute (Ill. Rev. Stat. 1971, ch. 95 1/2, par. 11-902) during closing argument. We decline to do so and affirm.

The following comments comprise the allegedly offensive statements made by plaintiff's counsel.

COUNSEL FOR PLAINTIFF: * * * I believe the Court will instruct you, there is a statute, a left turn statute that has the duties of both drivers spelled out, the turning driver and the oncoming car, what they must do before they can make a left turn and I want you to look at that carefully, because contrary to what some of you may believe about a left hand turn, no person is going to make a left hand turn with--

COUNSEL FOR DEFENDANT: I would object to arguing the law, Your Honor.

THE COURT: Oh, we will overrule your objection.

COUNSEL FOR PLAINTIFF: A person who is going to make a left hand turn has to make sure that before they make the turn it is reasonably safe to do so, once they determine that the person who is in the oncoming car has to yield the right-of-way, to yield the right-of-way.

COUNSEL FOR DEFENDANT: Objection, Your Honor. I don't believe that is a correct statement of the law, at all, I don't believe [Counsel for plaintiff] is correctly stating the law.

THE COURT: Well, the jury will receive the instructions on the matter and they will be correct instructions.

Defendant's counsel preserved his objection in the post-trial motion.

Defendant argues that the jury was misled by this exchange into believing that, under the law of this state, once the plaintiff believed in his own mind (subjective test) that it was safe to turn left in front of the oncoming defendant and proceeded to do so, then the defendant would have had to yield the right-of-way, irrespective of when or where the plaintiff turned in front of him. Thus,

plaintiff, under this interpretation, could have turned in front of defendant's car when defendant was only inches away and unable to stop and defendant would have been found guilty of failing to yield the right-of-way. Defendant maintains that the proper test under the law of this state is objective; that is to say that whether the plaintiff reasonably believed he could turn left without being struck by defendant's car. If his belief was reasonable and he had turned in front of the oncoming defendant, then under this interpretation, defendant would have had to yield the right-of-way.

The test is objective. However, our examination of plaintiff's counsel's argument to the jury does not convince us that he misstated the law, either directly or by implication. He stated that a person may not turn left unless "it is reasonably safe to do so" and that once it is reasonably safe to turn left, then an approaching car must yield the right-of-way to the turning vehicle. Use of the word "reasonable" makes it clear that he stated that the test was objective; not subjective. Furthermore, after overruling defendant's objection, the trial court informed the jury that, in any event, they would be given the proper instructions. An instruction written in the words of the statute (Ill. Rev. Stat. 1971, ch. 95 1/2, par. 11-902) was given to the jury and no objection is raised concerning it. We conclude that the jury was not misled by counsel's comments.

Finally, cases cited by defendant are not applicable to this case since they involve repeated misstatements of law by counsel to the jury designed to mislead and confuse them. Such was not the case here.

JUDGMENT AFFIRMED.

EGAN, P.J., and BURKE, J., concur.

Abstract only

59718

TRUDY GOMBERG,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellant,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
RAYMOND GOMBERG,	)	HON. ROBERT L. HUNTER,
	)	Presiding.
Defendant-Appellee.)	

PER CURIAM: (First District, First Division)

Before Burke, Goldberg and Hallett, JJ.

The parties were divorced on April 21, 1970. The decree granted custody of the three minor children of the marriage to plaintiff, Trudy Gomberg, and required defendant, Raymond Gomberg, to pay the amount of \$166.67 per child per month for child support. On June 28, 1973, pursuant to plaintiff's petition for an increase in support payments, the trial court ordered those payments increased by \$58.33, to \$225 per child per month. Plaintiff appeals contending that the increase in support payments is insufficient in that the court failed to take into account defendant's increased income in the post decree years or to take into account the increased needs of the children during those years.

By way of justification, the petition for increased support payments alleged the growth in defendant's income, the rising cost of living, the advancing ages of the children and the refusal of defendant to contribute to the increased cost of supporting the children. Defendant's answer denied such a change in circumstances as would prompt an increase in the support requirements. It alleged that plaintiff should contribute to the children's support out of her income; and also that, in addition to the monthly support payments required by the decree, defendant was expending substantial sums for the children's summer camp, insurance, dental work and other similar expenses.

During the hearing on the petition and the answer thereto, copies of defendant's income tax returns, corporate tax returns and related accounting documents were admitted into evidence. Those records showed that defendant, a medical doctor, had increased his income from the date of the decree to the date of the petition approximately 24%, with a proportional increase in his portion of the profit sharing and pension plans of the medical service corporation to which he belonged. The evidence adduced at the hearing also disclosed that he had expended substantial sums of money for, and on behalf of, the children, pursuant to the terms of the divorce decree.

Also during the hearing plaintiff introduced into evidence an itemized list of alleged expenditures she had made on behalf of the children. After hearing evidence with regard to that exhibit, the trial court found that the amounts which plaintiff had "estimated" therein were "out of line" and that the exhibit also contained expenses for plaintiff's own benefit, unrelated to the support of the children. The trial court thereupon found that a reasonable and sufficient increase in the total monthly support payments "for the time being" was \$175.

A party petitioning for an increase in child support must demonstrate not only the ability of the other party to afford the increase but that the needs of the child have also increased. Smith v. Smith, 132 Ill. App. 2d 722, 270 N.E.2d 206; Patterson v. Patterson, 28 Ill. App. 2d 76, 170 N.E.2d 11.

Contrary to plaintiff's assertion on appeal, the per centum amount of increased support ordered by the trial court substantially exceeded the per centum increase in defendant's yearly income. Further, plaintiff failed to offer any evidence relative to the increase in the cost of living for the years between the date of the decree and the date of the petition, therefore her argument on appeal that the cost of living increased

by 50% between 1967 and May 1974 is without support. Regarding plaintiff's argument that she offered sufficient evidence by way of the exhibit of her expenses, showing her increased cost in raising the children, the trial court found that her "estimates" were not realistic and, as she admitted at trial, that they included expenses which were properly chargeable only to her own support. The statement made by plaintiff, that defendant formed a corporation for tax purposes and thereby "drained off" income depriving his children of the benefit thereof, finds no support in the instant record. The corporation and the pension and profit sharing plans in question were in existence a considerable time prior to the date of the decree of divorce and presumably were fully known to plaintiff and her counsel at that time. Plaintiff has not demonstrated that the needs of the children have increased beyond the amount of support ordered by the court.

For these reasons the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

(Abstract Only)

FILED
NOV 16 1974

Walter T. Linn
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

PER CURIAM:

The State Appellate Defender, appointed as counsel on appeal, has filed a motion and memorandum pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1369, 18 L.Ed.2d 493, alleging that there is no merit to the appeal and requesting leave to withdraw. The petitioner has been given proper notice of the motion and granted an extension of time in which to file documents supporting his appeal. He has failed to respond..

Motion to withdraw allowed; judgment affirmed.

Publish Abstract Only.

FILED
NOV 20 1974Walter J. Dinnon
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURTIN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, )	)	Appeal from the Circuit Court of the Third
Plaintiff-Appellee, )	)	Judicial Circuit, Madison County.
vs.))	
ALVIN RAY LILLEY, )	)	Honorable William L. Beatty,
Defendant-Appellant. )	)	Judge Presiding.

Mr. PRESIDING JUSTICE G. MORAN delivered the opinion of the court:

Defendant was convicted of the crime of attempted robbery after a jury trial and sentenced to the Illinois State Penitentiary for a minimum of one year and a maximum of three years.

Defendant contends (1) that the indictment is fatally defective because it does not allege all of the essential elements of the crime of attempt, (2) that he was not proven guilty beyond a reasonable doubt, and (3) that defendant's cross-examination by the state's attorney about a prior conviction constituted reversible error, even though no objection was made.

The evidence discloses that the defendant accosted a woman in the street and said, "Give me your f--- money or I will kill you." She then screamed and took a couple of steps backward, and ran for the protection of a store. The defendant ran, but was pursued and caught.

After an examination of the record in this case, we find that no error of law appears, that an opinion in this case would have no precedential value and that the judgment is not against the manifest weight of the evidence.

We therefore affirm in accordance with Supreme Court Rule 23 (Ill. Rev. Stat., ch. 110A, par. 23.).

Judgment affirmed.

CONCUR:

Carter, Crebs, JJ.

73-158

3D
24 I.A. 221

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable GLENN K. SEIDENFELD, Justice
Honorable L.L. RECHENMACHER, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On December 17, 1974 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

RICHARD E. DeBOER,)	
)	
Plaintiff-Appellee,)	
	)	Appeal from the Circuit
v.	)	Court for the Sixteenth
	)	Judicial Circuit, Kane
PETER A. DeBOER, d/b/a	)	County, Illinois.
TOWNE & COUNTRY REAL)	
ESTATE,)	
)	
Defendant-Appellant.)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

Richard E. DeBoer, a real estate salesman, sued his brother and employer, Peter A. DeBoer, a broker, d/b/a Towne & Country Real Estate, to recover a share of a commission on the sale of a parcel of real estate. After a bench trial, a judgment in the amount of \$3,300 and costs was entered for the plaintiff. The defendant appeals, contending that the judgment is against the manifest weight of the evidence.

The property was ultimately sold by a third party, and the total commission was \$6,600 of which one-half was paid to the defendant as the holder of an exclusive written listing contract with the seller, Richard Richert. Richert testified on the plaintiff's behalf that in January of 1972 he and the plaintiff entered into an oral agreement under which the defendant real estate agency was to find a buyer for his property. He stated that pursuant to similar oral agreements there had been previous

real estate transactions between the seller and Towne & Country Real Estate in which the plaintiff had acted as the listing agent on behalf of Towne & Country. In March of 1972, the plaintiff requested and the seller consented to a reduction of the oral agreement on the property here involved to writing because the defendant, Peter DeBoer, had procured several prospective buyers. After it was prepared, the written exclusive listing agreement was brought to Richert by the defendant; it contained the same terms as the previous oral agreement which the seller had made with the plaintiff. The testimony of the plaintiff was substantially to the same effect. In addition, the plaintiff testified that under his oral "arrangement" with the defendant, if he obtained an oral exclusive listing he would receive one-half of the commission on a sale made by either himself or another agent of Towne & Country Real Estate, but if he obtained an oral open listing he would receive the one-half commission only if he sold the property, and if, pursuant to his oral open listing, another member of the firm were responsible for the sale, he would receive only 10% of the commission.

In the defendant's testimony he agreed that there was a "fifty-fifty split on the commission and (sic) the sale of any property" and that the "listing sales person" would receive 10% of the commission if it were sold through a broker from another office on any kind of a listing. The defendant stated that as to this particular sale and in accordance with the previous dealings between his brother and Richert, the plaintiff obtained merely an oral open listing from the seller. That because the plaintiff disregarded his directions to obtain a written exclusive listing, the defendant personally negotiated with the seller and by his own efforts procured that agreement. This, in his view, nullified the previous oral open listing.

The defendant argues that the testimony of plaintiff and Richert was inherently suspect since the two had gone into the real estate business together after this transaction, which relationship was in effect at the time of trial. He also contends that their testimony was impeached in various details on cross-examination.

The construction of the agreement between the parties based on controverted facts was for the judge below to determine. (See Trustees of Schools v. Schroeder (1971), 2 Ill.App.3d 1009, 1017.) While there appears to be some dispute in the evidence as to the division of commission based on an oral open listing, it is clearly established that if the plaintiff procured an exclusive listing which became a basis for the firm receiving a commission on the sale he was entitled to one-half of the commission. The real dispute here was over the question of who was, in fact, responsible for acquiring the listing. The resolution of this factual issue, which may be analogized to a conflict between competing brokers who dispute the procuring cause of a sale, was for the judge to decide as the trier of fact based on the weight and credibility to be afforded the conflicting evidence. (Moehling v. Brickman (1968), 98 Ill.App.2d 156, 163.) In view of the applicable standards, we conclude on our review of the record that the finding of the trial judge that the plaintiff was entitled to one-half of the commission is not against the manifest weight of the evidence. See Elgin Lumber & Supply Co., Inc. v. Malenius (1967), 90 Ill.App.2d 90, 97.

We, therefore, affirm the judgment.

Affirmed.

THOMAS J. MORAN, J. and RECHENMACHER, J. concur.

72-358

3D
24 I.A. 232

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable GLENN K. SEIDENFELD, Justice
Honorable L.L. RECHENMACHER, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On DEC 18 1974 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

Abstract

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	DOMEN J. STONEZ, Clerk
	)	Appellate Court, 2nd District
v.)	
	)	Appeal from the Circuit
W.R.L. SALES COMPANY,	)	Court of the 16th Judicial
	)	Circuit, DeKalb County,
Defendant-Appellant.	)	Illinois.

MR. JUSTICE RECHENMACHER delivered the opinion of the court.

Defendant, a bookstore operator, was convicted by a jury verdict of the sale of 2 obscene publications in violation of Sec. 11-20 of the Criminal Code (Ill. Rev. Stat.1971, ch. 38, par. 11-20), and was fined \$2,000 (\$1,000 for each offense). One of the publications was entitled "Anal Incest Between Father and Daughter"; this is a paperback book which candidly and explicitly narrates a series of incestuous and other sexual encounters, with depictions or descriptions of acts of masturbation, sadism and masochism. The other publication, called "Primer for Sexual Education, Volume VI", is almost exclusively composed of photographs--many in color--which portray nude males and females in groups of 2 or more engaging in a variety of sexual activity. In many instances the hands or mouths of the models are close to or upon another's genitals. The focal point of the photographs is on the genitals of the partners.

At the trial no other evidence as to obscenity was introduced by the State than the publications themselves. The

defense presented no evidence.

On appeal the defendant contends that the Illinois Obscenity Statute is unconstitutional in that it violates defendant's constitutional rights under the First and Fourteenth Amendments. A further contention made on oral argument in the light of Miller v. California (1973), 413 U.S. 15 and Ridens v. Illinois (1973), 413 U.S. 912, is that even if on remand of Ridens the Illinois Supreme Court were to hold the Obscenity Statute constitutional within the meaning of Miller, such holding could only be applied prospectively and not retro-^{1.}actively.

Upon remand of Ridens the Illinois Supreme Court in People v. Ridens (1974), ____ Ill. 2d ____, Docket Nos. 43974, 44449 cons. decided November 27, 1974, concluded that the Illinois Obscenity Statute is constitutional within the basic guidelines of Miller. The court also stated that it found "no impediment to the retroactive application of the statute * * * as now construed." Thus the Illinois Supreme Court in Ridens squarely decided the only issues before us.

Accordingly, the judgment of the circuit court of DeKalb County is affirmed.

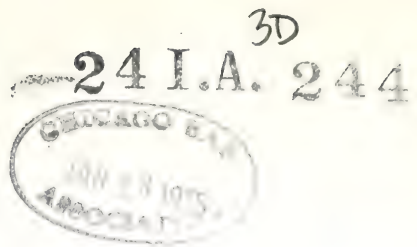
Judgment affirmed.

THOMAS J. MORAN, P.J. and SEIDENFELD, J., concur.

FOOTNOTE

1. At oral argument defendant's counsel conceded that other issues raised in the briefs were without merit and, therefore, we need not consider them.

58961-58962 (Consolidated)



PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
vs.	)	OF COOK COUNTY.
)	
ROBERT CONWAY (Impleaded),	)	HONORABLE
	)	DANIEL J. RYAN,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM: (First District, Second Division)

Before Hayes, P.J., and Leighton and Downing, JJ.

Defendant, Robert Conway, entered pleas of guilty to the offenses of burglary and violation of bail bond (bail jumping), in violation of sections 19-1 and 32-10 of the Criminal Code (Ill. Rev. Stat. 1967, ch. 38, pars. 19-1 and 32-10), and was placed on probation for concurrent terms of four years, the first 90 days to be served in the House of Correction. On December 6, 1972, after a hearing on that same day, he was found to be in violation of his probation. His probation was revoked and he was sentenced to terms of two years to ten years on the burglary conviction and one year to five years on the bail jumping conviction. He appeals, contending that the trial court improperly failed to admonish him pursuant to Supreme Court Rule 402 at the time he admitted the probation violations alleged in the revocation petition. 50 Ill. 2dR. 402.

The pleas of guilty to the offenses of burglary and violation of bail bond were entered on April 8, 1970, and on September 2, 1971, a rule to show cause why defendant's probation should not be revoked was dismissed and defendant was recommitted to probation. A second rule to show cause was entered against defendant on August 28, 1972, alleging a violation of his probation in that he failed to report to his probation officer and that his whereabouts were unknown.

At the hearing on the second rule to show cause, defense

counsel represented to the court that defendant was admitting the charges contained in the rule and that defendant would testify at the hearing in order to explain the circumstances of his failure to report to the probation authorities and of his absence from the jurisdiction. Defendant related to the court that he had gone to Ohio, where he had found employment, and that an accident had resulted in a six-week hospitalization in Ohio, after which he had returned to Illinois. The probation officer in attendance at the hearing stated to the court that defendant had not reported to the probation department and had left the jurisdiction without permission, and that defendant had reported to the probation authorities by telephone but the authorities were not certain that it was defendant who had in fact telephoned. The foregoing sentences were thereupon imposed by the trial court.

Defendant's contention that the trial court improperly failed to admonish him pursuant to the requirements of Supreme Court Rule 402 is obviated by the fact that his admission of failure to report to the probation authorities and of absenting himself from this jurisdiction was not a plea of guilty to the charges contained in the rule to show cause, but rather constituted a part of his defense attempt to explain and justify his actions in that regard. In essence, defendant defended against the charge that he violated his probation and took the stand in his own behalf to support that defense. Under the circumstances, the trial court was not required to anticipate the nature of defendant's testimony and was not required to admonish him pursuant to Supreme Court Rule 402. See People v. Collins, 14 Ill. App. 3d 446, 302 N.E. 2d 709. The cases cited by defendant in support of his position in this regard are consequently not in point: People v. Pier, 51 Ill. 2d 96, 281 N.E. 2d 289; People v. Bryan, 5 Ill. App. 3d 1006, 284 N.E. 2d 706.

58961-58962

For these reasons, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

30
24 I.A. 245

73-188

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable L.L. RECHENMACHER, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On DEC 18 1974 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

LENN J. STONE, Clerk
Appellate Court, 2nd District

No. 73 188

Abstract

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from the Circuit
	)	Court of 15th Judicial
JOHNNY BAILEY,	)	Circuit, Lee County,
	)	Illinois.
Defendant-Appellant.)	

MR. JUSTICE RECHENMACHER delivered the opinion of the court.

Following a jury trial the defendant was convicted of aggravated battery and sentenced to a term of not less than 2 nor more than 7 years. On appeal he contends that: (1) the trial court erred in denying his pretrial motion under Supreme Court Rule 414 to take an evidence deposition of a witness in West Germany, and (2) certain statements in the prosecutor's closing argument deprived the defendant of his right to a fair trial.

Defendant, accompanied by David and John Underhile, all of whom had been drinking, stopped their car, got out and joined Mr. Ronald Haley, his wife and his stepson, and another couple (the Henleys) who were fishing in the Rock River on the evening of June 26, 1972. Before long an argument started during which the incident occurred which resulted in Mr. Haley allegedly being thrown into the river and onto the rocks. His

injuries included a broken rib and a punctured lung.

Defendant was indicted July 18, 1972. On August 31 the State filed its motion for discovery requesting the names and addresses of defendant's proposed witnesses; the record does not indicate that the defendant complied with that request. On September 6 defendant moved the court for a continuance of the October 30¹ trial date because John Underhile, a "material" witness, was stationed in West Germany with the United States Army and as a result the date for trial was continued to January 8, 1973. The record does not disclose what occurred on that date, except for a reference to a January 31 trial date on defendant's motion filed on January 18.

On January 18, 6 months after he was indicted, defendant filed a motion for sufficient county funds to retain counsel in West Germany to take the evidence deposition of John Underhile at his army post and to continue the trial "set for January 31, 1973" until such deposition may be taken; in the alternative defendant moved that the trial date be continued until July 1974 when Underhile could testify in person. The court denied defendant's motion and on January 31 the case proceeded to trial.

Defendant complains that the trial court erred in basing the denial of the motion for continuance on defendant's failure to exercise diligence in requesting the taking of Underhile's deposition, and asserts in effect that there is no such requirement under Supreme Court Rule 414 (Ill. Rev. Stat. 1973, ch. 110A, par. 414). Subparagraph (b) of that rule provides that the taking of depositions in criminal cases "shall be in accordance with rules providing for the taking of depositions in civil cases". Supreme Court Rule 201 (f) (Ill. Rev. Stat. 1973, ch. 110A, par. 201(f)) relating to all discoveries in civil cases provides that "The trial of a case shall not be

delayed to permit discovery unless due diligence is shown."

(Emphasis added) The defendant did not move for the taking of Underhile's evidence deposition until a few days before the trial date of January 31. A continuance of the October 30 trial date to January 8 was granted on defendant's motion of September 6 for the reason that "John Underhile was with the U.S. Army stationed in West Germany." If defendant believed that Underhile was a "material" witness, whose testimony was required for his defense, he had ample time long before the trial date to present an appropriate motion.

It may be noted that in arguing defendant's motion for a trial continuance on September 6, 1972, because of Underhile's absence in West Germany, defendant's counsel stated that "the proposed deponent roughly * * * would say, that the cause under which the defendant is charged arose out of an altercation which was provoked by the complaining witness". Defendant took no steps to obtain Underhile's deposition even on that date and waited until January 18 to present his motion therefor. There is no affidavit in the record either by the defendant or Underhile² stating how the testimony of Underhile "would tend to exonerate" the defendant. (See U. S. v. Broker (1957), 246 F. 2d 328.) Moreover, it has not been shown that Underhile would be willing or available to testify or available to give the deposition. Under all the circumstances we are unable to say that the trial court abused its discretion in denying the defendant's motion for a continuance for and funds for the taking and the use of Underhile's deposition.

Next, the defendant contends that certain statements of the prosecutor in closing arguments to the jury deprived defendant of his right to a fair trial. The first such statement

of which defendant complains is the following:

"The State presented three people, three eye witnesses-- Mr. Haley, his wife and Mr. Hanley [sic], and all three of these people stated, on the witness stand, that they said [sic] defendant Bailey throw Mr. Haley into the Rock River on June 26th."

The fact is that only Mr. Henley, who was present at the scene and saw what occurred testified specifically that the defendant "picked up" Mr. Haley and "threw him in the river". Mr. Haley testified that in the course of an argument in which defendant stated his intention to throw the "bunch" in the river, defendant came behind a lawnchair in which Mr. Haley was sitting. There were a few more words and defendant grabbed him from behind. After Mr. Haley got up from his chair defendant had "ahold" of him and "[h]e [defendant] picked me up and threw me in, he picked me up underneath my shoulder blades". Mr. Haley further testified that after he was pulled out of the river he asked defendant his name and Mrs. Haley said "she was going to get in the car and go down and press charges"; that defendant said "If you go down and press charges we will throw you all in".

While Mrs. Haley, in testifying to the incident, substantially corroborated the testimony including the fact that when she turned around her "husband was in Bailey's arms and the next thing a splash in the water," she stated that she did not see defendant throw Mr. Haley in the river.

Defense counsel did not interpose objection to the statement of the prosecutor to the effect that three witnesses said they saw defendant throw Mr. Haley into the river. However, he did call attention to the error of the statement when in his closing argument he stated:

"He [the prosecutor] said three witnesses said they saw Johnny Bailey thro [sic] the complainant into the river. Now, I challenge the State to read the record back, and Mrs. Haley in answer to my question, 'Did you see Mr. Haley being thrown into the river?' she said 'No' "

In any event this would appear to be harmless error. Moreover, defense counsel's failure to make a specific objection to the statement in question constitutes a waiver. People v. Conrad (1967), 81 Ill.^{App.}2d 34, 49-50; People v. Gaston (1967), 85 Ill. App. 2d 403, 408-409; People v. Hope (1974), 22 Ill. App. 3d 721, 726.

Another alleged misstatement in the prosecutor's closing argument of which defendant complains is that in which the prosecutor argued to the jury that Mrs. Haley "staunchly" denied having offered the defendant money to testify in a civil case, and that there was no testimony that Mr. or Mrs. Haley ever asked defendant or Underhile "to change any story they have given". While defendant interposed no objection to these statements either, he now argues that Mrs. Haley admitted offering defendant money to testify in support of Mr. Haley's possible dram shop suit.

Our examination of the record discloses that Mrs. Haley testified that she and Mr. Haley had discussed such possible suit with the defendant and Underhile, not that she offered them money to change any story. Defendant testified that in December of 1972 Mr. Haley asked the defendant if he wanted to make some money out of this; that Haley "had a Dram Shop against Troy's bar" and "that all I had to say was that I throwed [sic] him in the river and that I was drinking at that bar". Mr. Dave Underhile testified to similar effect. We find nothing in that testimony indicating a request by Mr. Haley that defendant or

Underhile "change any story". Thus, the prosecutor's statement was not a misrepresentation of the facts.

In any case, defendant's failure to object to any of the statements complained of constitutes a waiver.

Therefore, no prejudicial error having been shown, the judgment is affirmed.

Judgment affirmed.

GUILD and SEIDENFELD, JJ., concur.

FOOTNOTES

1. The reference to the trial having been set for October 30 is made in a document captioned "Affidavit" set forth in the abstract, which purports to have been signed by defendant and attached to that motion, but which is not included in the record on appeal. Such "Affidavit" is also relied on by defendant in his motion filed January 18, 1973.
2. See footnote 1.

73-383

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable L.L. RECHENMACHER, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On DEC 12 1974 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED

LEON J. STOLTZ, Clerk
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from the
	)	Circuit Court of
	)	the Nineteenth
JAMES GECIAS a/k/a	)	Judicial Circuit,
ROBERT HAYWOOD,	)	Lake County, Illinois.
)	
Defendant-Appellant.)	

MR. PRESIDING JUSTICE THOMAS J. MORAN delivered the opinion of the court:

On May 27, 1971, defendant pled guilty to burglary and was sentenced for a term of 1 to 5 years. No direct appeal was taken from the conviction.

On March 1, 1973, defendant filed, pro se, a post-conviction petition alleging only "(1) incompetent counsel; (2) constitutional rights violated". His appointed counsel searched the trial proceedings and corresponded with defendant in an attempt to factually expand the allegations so as to amend the petition. Such efforts were non-productive. The trial court thereupon dismissed the petition without an evidentiary hearing and defendant appealed.

Pending appeal, appellate counsel has filed a motion to withdraw supported by briefs. While the briefs have raised various issues, counsel concludes (with supporting case law) that the issues are without merit and the appeal is frivolous.

We have followed the dictates of Anders v. California, 386 U.S. 738, 744, 18 L.Ed. 2d 493, 498, 87 S. Ct. 1396 (1967). The appeal has been considered on the basis of our own review of the record and counsel's motion with accompanying brief. We find no error.

The motion to withdraw, therefore, is allowed and the judgment affirmed.

GUILD, RECHENMACHER, J.J. - concur

24 I.A.^{3D} 258

(24540-4M-970) 160-6



STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE LELAND SIMKINS, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE HAROLD F. TRAPP, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 5th day
of December A. D. 19 74, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 12141

Agenda No. 74-177

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee

v.

TRUMAN BURGE,

Defendant-Appellant

Appeal from
Circuit Court
Sangamon County
109-72

Mr. JUSTICE SMITH delivered the opinion of the court:

This is an appeal from the circuit court of Sangamon County imposing a sentence of 1 to 10 years on a jury verdict finding the defendant guilty of aggravated battery and reckless conduct. In this court, the defendant contends (1) that jury verdicts of guilty to aggravated battery and to reckless conduct arising out of the single shooting of one person are mutually inconsistent as a matter of law and the defendant is entitled to a new trial on such verdicts, (2) whether preliminary evidence setting forth the relationship between the victim and the defendant over a period of time was irrelevant and immaterial and prejudicial to the defendant warranting a new trial, (3) whether the prosecutor made improper statements regarding the evidence and the law so as to inflame the jury warrant a new trial, (4) whether the court erred in instructing the jury,

(5) whether the court erred in denying defendant's motion for probation and imposing the sentence appealed from, and (6) whether the evidence was sufficient to prove the defendant guilty beyond a reasonable doubt. We affirm the trial court.

The defendant was a deputy sheriff in Sangamon County and keeping company with the victim, a widow with three children. A great deal of the evidence in this case generally is background evidence involving the question of motive, intent and jealousy of the defendant and previous threats made by him against her. That the defendant became increasingly unhappy over her keeping company with other young men is clearly disclosed together with his indication of displeasure made known to her and their friends on several occasions including some more or less thinly-veiled threats. On the evening in question in the parking lot of the tavern where the defendant, the victim and several of their friends had been together, the defendant obtained a shotgun from his car from which one shot was fired, severely injuring the victim. In the parking lot, he leveled the shotgun at her striking her in the left arm and abdomen and permanently injuring her to the extent that several operations were necessary and at the time of the trial nerves in her left arm had not yet re-activated themselves. The operations resulted in a shorter arm. The defendant had been drinking at the time.

The record also shows that the defendant was a large man and had had two operations himself which were causing him physical discomfort and perhaps contributing to his jealousy and irritability. The defendant asked for probation and some

15 or 20 witnesses testified in aggravation and mitigation. The victim opposed probation and the probation officer to whom the matter was referred recommended that probation be denied. We think it can be fairly said that this denial was not per se because of a bad past record or personality, but because a lethal weapon was used. Defendant was denied probation and the sentence noted was imposed.

In People v. Thomas, 1 Ill.App.3d 139, 275 N.E.2d 253, this court held that the offense of reckless conduct is a lesser included offense of aggravated battery. Under the circumstances in that case, we did so on the defendant's claim that reckless conduct is a separate statutorily defined offense. The defendant was indicted for attempted murder, upon which a verdict of acquittal was directed for the offense of aggravated battery. The jury was instructed that reckless conduct was a lesser included offense of aggravated battery and defendant was found guilty of that lesser offense. In that case we referred to People v. Norris, 118 Ill.App.2d 406, 254 N.E.2d 304, where our colleagues on the second district discussed the question of inconsistency between aggravated battery and reckless conduct and whether or not they were mutually exclusive. In that case, however, the events took place over several days and the court observed that a finding of guilty as to both was justified on the theory that different acts were involved. In Thomas, we concluded that the only element of difference relates to the degree of culpability and the lesser of these relates to

reckless conduct. Neither of these cases fully answer the issue here raised. It can be said that in Norris the court implied that aggravated battery and reckless conduct arising out of the striking of one victim would be mutually inconsistent. That court did not meet that issue nor did it decide it. The jury's verdict in the case at bar is not one where the defendant was found guilty of one and not guilty of the other arising out of the same act, but rather guilty of both arising out of the same act. Thus, the real issue here raised is whether or not the jury was justified in its verdict of finding this defendant guilty of both aggravated battery and reckless conduct. Adhering to the views expressed in Thomas that we deal only with degrees of culpability and noting that the sentence here was one sentence of aggravated battery, we should reverse the conviction of the lesser crime of reckless conduct, provided the conviction for the greater is affirmed. People v. Leggett, 2 Ill.App.3d 962, 275 N.E.2d 651.

The defendant further complains that evidence and circumstances in the record were prejudicial to the defendant and thus denied him a fair trial. He objected to the People's introduction of a pistol which the evidence shows had been used on prior occasions to threaten the victim. The argument is that it was not in use at the time of the incident here in question and therefore inadmissible. This pistol was not introduced for the purpose of showing that the defendant had committed another

crime but for the purpose of establishing the defendant's mental state towards the victim. In the context of this case and the circumstances of this shooting it was not error to admit it. (People v. Dewey, 42 Ill.2d 148, 246 N.E.2d 232; People v. Bauer, 7 Ill.App.3d 512, 288 N.E.2d 24; People v. Smith, 3 Ill.App.3d 958, 279 N.E.2d 512.) The pistol was not used by the prosecution in closing argument nor did it go to the jury room. Evidence that he had otherwise threatened the victim some two weeks before was objected to and admitted. Defendant objected to the testimony of another witness that the defendant pointed the shotgun at him and his wife immediately following this shooting. Such evidence is admissible to establish the frame of mind of the defendant at and immediately following the occurrence in question. Defendant further complains that the victim wept during the course of the trial and that this entitles him to a new trial. This occurred while the victim was recounting her injuries suffered at the hands of the defendant and when we consider her previous friendly relationship with this defendant and the fact that from his act and his conduct, she had not yet regained the use of her arm and which would be shorter for the rest of her life, it appears to us that an emotional reaction on her part and under such circumstances is neither surprising nor contrived for the purpose of getting the sympathy of the jury. A prompt and quick recess was immediately called by the trial judge to give the witness time to compose herself. Witnesses or parties do not leave their God-given human emotions at home or in the hallway outside the



courtroom and it is to be expected that in a strange atmosphere and the stress of testifying, a witness may display some emotion. Any trial judge knows that this is not infrequent and quickly recognizes when it appears to be contrived rather than an irresistible consequence of strain. Here it clearly appears to have been spontaneous.

The defendant next objects to the prosecutor's use in closing argument of pieces of paper on which were written certain instructions. We have some difficulty in following defendant's objections to the use of these documents or exactly how they were used in the closing argument. There is no charge that the prosecutor misstated the law. It is urged that the prosecutor's argument that the defense of intoxication was no defense whatsoever was prejudicial. This statement is clearly taken out of context and was used in relation to the defendant's condition at the time of the incident rather than a bald statement that intoxication is never a defense. This argument is likewise without merit and is supported only by the case of People v. Weinstein, 35 Ill.2d 467, 220 N.E.2d 432. That case is readily distinguishable from this case in that there the prosecutor misstated to the jury the law on the presumption of innocence. That case has little relationship to the incidents here complained about.

The defendant likewise argues that a circumstantial evidence instruction should not be given because all of the evidence in this case was direct rather than circumstantial, and

under said circumstances no circumstantial evidence instruction should be given. (People v. Gardner, 4 Ill.2d 232, 122 N.E.2d 578.) If there was no circumstantial evidence in the case, we fail to see how the jury was mislead. If there was, it was proper.

The defendant contends that the trial court erred in denying the defendant's motion for probation and cites the number of people called in his behalf, his record as a deputy sheriff and as a law-abiding citizen in the community, and suggests that the trial court overlooked the constitutional order and mandate that in sentencing the penalties "shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship". The defendant cites People v. Steadman, 3 Ill.App.3d 1047, 280 N.E.2d 17, a case which we think is not apropos to the position of the defendant. We assume, although the defendant does not say so, that he has no quarrel with the proposition that the offense here considered is not only serious but could well have resulted in death rather than injury. We take it therefore that the abuse of discretion by the trial court, if any, is based upon the objective of restoring the offender to useful citizenship. It is clear here that the trial court considered the granting of probation in this case. The probation officer recommended that it be denied and gave his reasons for such recommendation, that is, (1) it would be difficult for anyone to say that this defendant would not commit a similar offense as no one would have expected this of him in the first place,



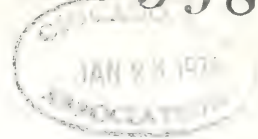
and (2) his conduct over the previous several weeks in connection with this victim was conduct that is hardly indicated as that of a trained and well-qualified police officer. If anyone should have known better, he should. We cannot say on this record that the court abused its discretion in denying the defendant probation and it is such discretion only that this court can review under People ex rel Ward v. Moran, 54 Ill.2d 552, 301 N.E.2d 300. We cannot say that here the trial court abused its discretion in its determination that a nonprison sentence would deprecate the seriousness of the offense.

The defendant lastly asserts that his guilt was not established beyond a reasonable doubt. We have carefully reviewed the evidence as well as the defendant's argument. Neither point out wherein there is any insufficiency to remove all reasonable doubt of the defendant's guilt. The assertion of a failure to prove guilt beyond a reasonable doubt without pointing out to this court what and where it is, and where a statement of the facts by the defendant himself established that guilt beyond a reasonable doubt, such alleged error is purely semantics.

Accordingly, the judgment of the trial court should be and it is hereby affirmed. The conviction for reckless conduct is reversed.

Affirmed in part; reversed in part.

SIMKINS, P.J. TRAPP, J., concur.



59891

EDWARD I. HORWICH,)	
)	
Plaintiff-Appellant,	)	APPEAL FROM
)	
v.	)	CIRCUIT COURT,
)	
	)	COOK COUNTY.
ELAINE L. HORWICH,)	
	)	Hon. Raymond P. Drymalski,
	)	Presiding.
Defendant-Appellee.)	

Mr. JUSTICE DIERINGER delivered the opinion of the court:

This is an appeal from a decree entered by the Circuit Court of Cook County denying plaintiff's petition for credit of certain temporary support payments.

The only issue presented on appeal is whether the trial court properly denied plaintiff's petition for credit.

The plaintiff, Edward Horwich, brought an action for divorce against the defendant, Elaine Horwich, in 1970. In September, 1971, after plaintiff had filed an amended complaint for divorce and partition, the defendant petitioned the court for temporary alimony and child support. On September 10, 1971, the trial court ordered the plaintiff to pay the defendant \$200 per week as temporary alimony and child support. On September 6, 1972, the court entered an order terminating the temporary alimony and child support.

The case proceeded to trial in early 1973, and on February 22, 1973, the court entered a decree which dismissed plaintiff's complaint for divorce. The court retained jurisdiction to adjudicate, inter alia, the issue of temporary alimony arrearages and child support claimed by the defendant.

On August 8, 1973, the trial court entered a supplemental decree ordering the plaintiff to pay the defendant \$10,400, less a credit of \$2,246.02, as and for temporary alimony and child support for the 52-week period from September 10, 1971, through September 6, 1972.

On August 29, 1973, the plaintiff filed a petition for credit, alleging he had paid the sum of \$8,303.59 for defendant's benefit. On October 4, 1973, the trial court entered a supplemental decree which denied plaintiff's petition for credit. This appeal is from said supplemental decree of October 4, 1973.

The plaintiff contends no sworn testimony was taken by the trial court in response to plaintiff's petition for credit and, accordingly, the court was obliged to accept as true plaintiff's sworn allegations as to his expenditures made for the defendant's benefit. Plaintiff argues the court's failure to grant said petition was error.

We believe the plaintiff's contention is without merit. The supplemental decree appealed from recites as follows:

"This cause coming on to be heard in furtherance of the Decrees of this Court entered on the 22nd day of February, 1973, and on the 8th day of August, 1973, and specifically that portion of the Decree wherein the Court retains jurisdiction of this cause for the purpose of adjudicating . . . the Petition of the plaintiff for credit against temporary alimony in the amount of \$8,303.59, and court costs and the plaintiff having appeared in Court in person . . . and the defendant having appeared in Court in person . . . and the court hearing the testimony of the witnesses duly sworn and examined in open court and the court considering the evidence proffered by both parties, and now being fully advised in the premises, IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED;

1. That the plaintiff's Petition for \$8,303.59 credit is hereby denied" (Emphasis supplied.)

Plaintiff challenges the verity of the above-quoted supplemental decree by a collateral statement that no hearing was held in the instant case. Plaintiff has failed to present to this court a transcript of the proceedings or a Bystander's Report, verifying his contention. In Jones v. City of Carterville, (1950) 340 Ill. App. 330, the Appellate Court succinctly stated:

"The rights of litigants must be determined from official records, and cannot be permitted to rest upon anything so transient as the personal recollection of individuals. This results in the universal rule that the records of the court import verity, and cannot be contradicted, except by other matters of record."

Plaintiff has presented no matter of record to this court to contradict the finding of the trial court. The affidavit of the court reporter submitted by the plaintiff in lieu of any report of proceedings is without merit. It is a well established principle that a party cannot contradict a record by an affidavit. Arnold v. Pope, (1931) 262 Ill. App. 345.

For the reasons stated herein, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

ADESKO, P.J., and JOHNSON, J., concur.

Abstract only.

11-27-11
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59851

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
	)	HONORABLE JOHN M. BREEN,
WILLIAM G. MacPHAIL,	)	Presiding.
)	
Defendant-Appellant.))	

PER CURIAM:

Before: HAYES, P.J., STAMOS and DOWNING, JJ.

William G. MacPhail, defendant, was charged with driving a motor vehicle under the influence of intoxicating liquor in violation of Ill. Rev. Stat. 1973, ch. 95 1/2, par. 11-501. After a bench trial in the circuit court of Cook County, he was found guilty and fined \$100 plus \$5 costs. Defendant appeals arguing that the evidence was insufficient to establish his guilt beyond a reasonable doubt.

At trial, Michael Staufenbiel, a police officer for the village of Wheeling, testified that on May 12, 1973, at approximately 2:52 A.M., he observed the defendant's vehicle blocking the exit to the shopping center at Willie Avenue and Dundee Road. After approximately five seconds, defendant drove eastbound on Dundee Road and Officer Staufenbiel followed. At Milwaukee Avenue defendant made a right hand turn and proceeded southbound. At that time Officer Staufenbiel observed the defendant weave from lane to lane three or four times. Two vehicles proceeding in a northerly direction on Milwaukee Avenue flashed their bright lights at the defendant and then dimmed them. Officer Staufenbiel testified that he then stopped defendant's vehicle. Officer Staufenbiel approached defendant's vehicle and asked the defendant for his driver's license. It took the defendant approximately thirty seconds to produce a license from his wallet. An examination

of the front of defendant's vehicle revealed that his bright lights were on. Defendant was then placed in a squad car and transported to the police station. Officer Staufenbiel testified that there was a very strong odor of alcohol on defendant's breath. Defendant's clothes were in an orderly condition.

At the station, Officer Staufenbiel administered standard performance tests to the defendant. On the balance test defendant was swaying. In the walking test defendant was unsure. On the finger to the nose test defendant was hesitant. In the coin test the defendant was slow. Officer Staufenbiel testified that he has been a member of the police department for two years during which period of time he observed approximately twelve other people under the influence of intoxicating liquor. Officer Staufenbiel testified that based upon his experience and his observations of the defendant, it was his opinion that the defendant was under the influence of intoxicating liquor. Officer Staufenbiel testified that at the police station he asked defendant if he had been drinking. Defendant stated that he had had nine seven-sevens that evening, including four seven-sevens in the three hours preceding his arrest.

William MacPhail, defendant, testified that four years earlier he had had a spinal fusion on his neck. At that time he was in the hospital for one month and was home for seven months. Defendant testified that after his arrest, he informed the officer that he was under a doctor's care for his neck and back. Defendant testified that at the police station, Officer Staufenbiel asked how much he had to drink that evening. Defendant stated that he informed the officer that he had consumed four drinks. Defendant denied ever telling the officer that he had consumed nine drinks. Defendant stated that he consumed the drinks between 7:30 P.M. and 9:30 or 10:00 P.M. Defendant testified that he did not believe he was under the influence of intoxicating liquor at the time he was

placed under arrest.

Defendant's only argument on appeal is that the evidence was insufficient to establish his guilt beyond a reasonable doubt. In a bench trial the credibility of witnesses and the weight to be given to their testimony are matters for the trier of fact to determine. Only where the evidence is so unsatisfactory as to raise a reasonable doubt as to defendant's guilt will those findings be disturbed. People v. Mann, 15 Ill.App.3d 912, 305 N.E.2d 351; People v. Raddle, 39 Ill.App.2d 265, 188 N.E.2d 101.

In the case at bar, Officer Staufenbiel testified that when he first observed defendant's vehicle it was blocking the driveway to a shopping center. After a short period of time, defendant drove off and Officer Staufenbiel followed. Defendant weaved from lane to lane several times. Officer Staufenbiel testified that, thereafter, several cars flashed their bright lights on and off as they passed defendant's vehicle. At this time Officer Staufenbiel stopped defendant's vehicle. He approached defendant's car and asked defendant to produce a driver's license. After approximately thirty seconds, defendant produced his driver's license. Defendant had his bright lights on. At this time he informed defendant that he was under arrest and placed him in his squad car to transport him to the police station. He detected a strong odor of alcohol on defendant's breath. At the station, certain performance tests were administered to the defendant. On the balance test defendant was swaying; on the walking test defendant was unsure; on the finger to the nose test defendant was hesitant; and in the coin test defendant was slow. Further, in response to questioning by Officer Staufenbiel, defendant stated that he had consumed nine drinks on the evening in question including four drinks in the three hours preceding his arrest. Officer Staufenbiel testified that it was his opinion that defendant was under the influence of intoxicating

liquor. While defendant places great reliance upon the fact that he had an injury to his neck which could have caused fatigue, we have noted that defendant's trial testimony was that he had an operation four years prior to the incident in question. In addition, defendant's testimony as to his medical condition was completely uncorroborated at trial. After a complete review of the entire record we believe that the evidence adduced by the State was sufficient to establish defendant's guilt beyond a reasonable doubt.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

PUBLISH ABSTRACT ONLY.

60050



24 I.A. 400^{3D}

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
vs.	)	OF COOK COUNTY.
)	
DELORES SMITH,	)	HONORABLE
	)	DAVID CERDA,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM: (First District, Second Division)

Before Hayes, P.J., Leighton and Downing, JJ.

Delores Smith, defendant, was found guilty after a bench trial of the crime of prostitution in violation of section 11-14(a) (1) of the Criminal Code. Ill. Rev. Stat. 1973, ch. 38, par. 11-14(a) (1). She was sentenced to a term of 75 days.

Defendant wished to appeal and the Public Defender of Cook County was appointed to represent her. After examining the record, the Public Defender filed a motion in this court for leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U.S. 738, a brief in support of the motion has also been filed. The brief concludes that an appeal in this case would be wholly frivolous and without merit. Defendant was mailed copies of the motion and brief on July 19, 1974. She was informed she had until November 3, 1974, to file any additional points she might choose in support of her appeal. She has not responded.

The motion and brief of the Public Defender allege that the only possible argument which could be raised on appeal is that the evidence was insufficient to establish defendant's guilt beyond a reasonable doubt. At trial, Gregory Ankebrant testified that on August 22, 1973, he was walking down Belmont Avenue on his way to a nearby restaurant. As he approached

826 West Belmont, he observed Margaret Martin and Delores Smith standing in a doorway. Both women began a conversation with him, during which they asked if he wanted a "hot date". Both women offered to have intercourse or to perform an act of deviate sexual conduct for money. Ankebrant stated that he was not interested and walked away.

Ankebrant's trial testimony was corroborated by that of Chicago Police Officer Beyer, who testified that as he arrived upon the scene he observed Ankebrant talking to Delores Smith and Margaret Martin. Ankebrant informed Officer Beyer that both women had solicited him for the purpose of prostitution. Officer Beyer testified that he placed Margaret Martin under arrest in a nearby restaurant. As he approached Delores Smith to place her under arrest, she ran upstairs to her apartment, locked the door and refused entry to Officer Beyer. Smith was subsequently arrested as she tried to escape down a rear stairway.

The rule is well established that in a bench trial, it is the duty of the trial judge to determine the credibility of witnesses and the weight to be given to their testimony. Only where the evidence is so unsatisfactory as to raise a reasonable doubt as to defendant's guilt will the findings of the trial court be disturbed. People v. Hampton, 44 Ill. 2d 41, 253 N.E. 2d 385. The testimony of a single witness if positive and credible is sufficient to sustain a conviction even though contradicted by the accused. People v. Griffin, 12 Ill. App. 3d 193, 297 N.E. 2d 770. After a complete review of all the evidence adduced at trial, we find that the State's evidence was sufficient to establish defendant's guilt beyond a reasonable doubt, even though defendant presented evidence to the contrary.

We have examined the record and concur in the opinion of the Public Defender that the argument thus raised does not

have substantial merit. Our inspection of the record does not disclose any additional possible grounds for an appeal which are also not frivolous. Accordingly, the Public Defender of Cook County is granted leave to withdraw as counsel on appeal and the judgment of the circuit court of Cook County is affirmed.

MOTION ALLOWED;
JUDGMENT AFFIRMED.

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STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE LELAND SIMKINS, Presiding Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 17th day
of December A. D. 1974, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

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STATE OF ILLINOIS

FOURTH DISTRICT

Agenda No. 74-189

Plaintiff-Appellee

Appeal from
Circuit Court
Macon County
70-CF-67

Defendant-Appellant

Defendant appeals from an order of the circuit court of Macon County denying his petition for post-conviction relief filed with regard to his conviction on the charge of burglary.

Defendant was indicted, tried and found guilty by a jury of the offense of burglary and he prosecuted a direct appeal to this court. We affirmed his conviction in People v. John, 5 Ill.App.3d 544, 283 N.E.2d 319. While his case was on appeal to this court, he filed an original petition for post-conviction relief which the trial court ordered to be joined with his direct appeal. However, thereafter defendant filed his first amended petition for post-conviction relief which essentially realleged the issues raised in his direct appeal. During the course of the

evidentiary hearing held on the petition, the defendant took the stand and testified in his own behalf. Defendant contended that the arresting officers did not have probable cause to arrest and searched him without a warrant; and that items found upon his person were inadmissible in evidence against him. The trial court denied defendant's petition for post-conviction relief and defendant appealed. Defendant presents two issues for review: (1) whether the trial court erred in refusing to suppress evidence seized when defendant was arrested on the grounds the arrest was made without probable cause; and (2) whether the doctrine of waiver and res judicata now bars consideration of these matters in a post-conviction hearing.

Our opinion in People v. John, above mentioned, is dispositive of the first issue. Accordingly, the doctrine of res judicata precludes defendant from now raising any new questions on appeal. It is axiomatic that where an appeal was taken from a conviction, the judgment of the reviewing court is res judicata as to all issues that were raised or could have been raised but were not. (People v. Adams, 52 Ill.2d 224, 287 N.E.2d 695; Ill.Rev.Stat. 1973, ch.38, paras. 122.1 - 122.7.) In People v. Dowling, 51 Ill.2d 370, 282 N.E.2d 696, the supreme court stated that where an argument concerning the exclusion of evidence taken in an alleged illegal search and seizure was available on the record of a direct appeal, it was barred by res judicata in a post-conviction proceeding. (Also see: People

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v. Valadez, 17 Ill.App.3d 499, 308 N.E.2d 253.) The judgment of the circuit court denying defendant's petition for post-conviction relief is affirmed.

JUDGMENT AFFIRMED.

SIMKINS, P.J., and TRAPP, J., concur.

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73-201

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable ALBERT E. HALLETT, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On DEC 18 1974 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

Handwritten notes in the top left corner, possibly including the word "Bin" and some numbers.

Abstract

73 201

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Appellate Court, 2nd District

JEAN C. BOBUS,)	
	)	Appeal from the 18th
Plaintiff-Appellee,	)	Judicial Circuit,
)	
v.	)	DuPage County, Illinois
)	
CHARLES E. BOBUS,)	
)	
Defendant-Appellant.)	

MR. JUSTICE GUILD delivered the opinion of the court:

The sole question which appellant seeks to raise in this appeal is whether the lowering of the age of majority for all children to 18 years of age affects a decree of divorce entered prior to the effective date of such act. (Ill.Rev.Stat. 1973, ch. 3, sec. 131.) The decree of divorce here in question provided the defendant's obligation for the support of his minor children continued until the child attained his majority. Perhaps more succinctly stated, the question is, is the defendant required to support the male child here involved after he attains the age of 18 or is he obligated to support that male child until the child reaches the age of 21, that being the age of majority in effect at the time of the entry of the decree of divorce?

The decree of divorce herein was entered on June 27, 1968 and the support payments were not stipulated to, but set by the court in the decree, to-wit: \$25.00 per week for each child until that child either married, attained his majority or was emancipated. Defendant was in arrears on his child support payments and on November 27, 1972 the plaintiff filed a petition for the arrearage. No testimony was taken and no pleadings filed by the defendant. On March 13, 1973 the trial court entered an order finding that "... there is due to plaintiff from defendant as of February 21, 1973, for

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child support the sum of \$800.00." We are not able to ascertain from the record presented, and from the brief of defendant, what support period was covered by the order of support in the sum of \$800.00.

The defendant has appealed, and, somewhat reversing the situation, in this court the plaintiff-appellee has not filed any pleadings. As is well known, we may, of course, reverse pro forma in such a situation. Defendant's counsel did, however, appear in court and, by stipulation of appellant's counsel, we allowed him to present oral argument. We decline to reverse pro forma.

The question presented herein by the appellant was obviously not raised in the trial court as appellant did nothing in that court.

It has been the rule in this state, and the courts of this state have repeatedly said, with respect to an appellant, that "...the theory upon which a case is tried in the lower court cannot be changed on review and that an issue not presented to or considered by the trial court cannot be raised for the first time on review." Woman's Athletic Club v. Hulman (1964) 31 Ill.2d 449, 454, 202 N.E.2d 528, 530-31.

We, therefore, affirm the trial court. Attention, however, is directed to the recent cases of this court; Carpenter v. Carpenter (1974) 316 N.E.2d 207, 21 Ill.App.3d 1022; Waldron v. Waldron (1973) 13 Ill.App.3d 964, 301 N.E.2d 167 as being dispositive of the issue which appellant attempts to raise in this court.

AFFIRMED.

Seidenfeld, P.J. and Hallett, J concur.

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24 I.A. 468^{3D}

NO. 58869

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM
)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY.
)	
vs.)	
)	
MILFORD G. MAYNARD,	)	HONORABLE
	)	ARTHUR L. DUNNE,
Defendant-Appellant.	)	PRESIDING.

MR. JUSTICE LEIGHTON delivered the opinion of the court:

A four-count indictment charged Milford G. Maynard and Gordon Donnell with three counts of murder and one count of armed robbery, all against the same victim, one Albert Daniel Burkhard. The counts that charged murder alleged that they stabbed and killed Burkhard with a knife (1) intentionally and knowingly; (2) knowing that such stabbing created a strong probability of death or great bodily harm; and (3) while committing a forcible felony, that is, robbing him while armed. The armed robbery count alleged that the two defendants, while armed with a dangerous weapon, took property and an unknown amount of currency from Burkhard's person and presence.

On the day the case came for trial, the lawyer representing the defendants told the court he had just learned that the prosecution had new evidence against his clients which he wanted to discuss with them. On being told of this development, the trial judge instructed the lawyer to talk with the defendants and with the assistant state's attorney in charge of the prosecution. A short time later, the matter was called; and after defendants assured him that they had adequately discussed their case with their lawyer, the trial judge informed them concerning the nature of the charges against them. When this was concluded, the assistant state's attorney told the court that the prosecution was requesting that the count that charged felony murder

be nolle prossed.^{1/} The request was granted; and thereupon, defense counsel informed the court that, the felony murder count having been disposed of, Maynard was going to withdraw his plea of not guilty and plead generally to the indictment. On being so advised, the trial judge proceeded to admonish him as required by Supreme Court Rule 402 (a) (2).^{2/}

THE COURT: You understand, sir, that on your plea generally to this indictment, I can, if I see fit, find you guilty of the crime of murder on two counts, which call for a sentence of not less than 14 and to any greater number of years, so that I could sentence you from 14 to 100 or 15 to 100 years on Count I of the indictment and I could impose a sentence of not less than 14 nor more than any number of years on Count II of the indictment, so that I could sentence you from 14 to 50 years on Count II of the indictment or 14 to 90 years on Count II of the indictment; and that the sentences in Count I of the indictment and Count II of the indictment could run one right after the other.

Do you understand that?

DEFENDANT MAYNARD: Yes, sir.

THE COURT: Do you further understand that on Count IV of the indictment, I can, if I see fit, sentence you to a term of years not less than 2 nor any number of years more than 2, so that I could sentence you from 5 to 15, from 2 to 21, or from 7 to 50 years, under a plea of guilty to armed robbery.

Do you understand that?

DEFENDANT MAYNARD: Yes.

^{1/} The expression "nolle prossed" is a colloquialism of the criminal law practitioner that has evolved from the words "nolle prosequi", law latin which, translated literally, mean "to be unwilling to prosecute." Wilson v. Renfro (Fla. 1957), 91 So. 2d 857; see People v. Bryant, 409 Ill. 467, 100 N. E. 2d 598.

^{2/} Supreme Court Rule 402 (a) (2), Ill. Rev. Stat. 1971, ch. 110A, pars. 402 (a) (2).

In hearings on pleas of guilty, there must be substantial compliance with the following:

(a) Admonitions to Defendant. The court shall not accept a plea of guilty without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

(1) * * *

(2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences;

THE COURT: Do you understand, further, that I can, if I see fit, find you guilty of the lesser included offenses of voluntary manslaughter on your plea of guilty to the charge of murder, and on those sentences and those charges, I could sentence you from not less than one nor more than 20 years or any part thereof, 15 to 20, 7 to 20, 6 to 20, on Count I of the indictment, and I could sentence you from any number of years not less than 1 nor more than 20 on Count II of the indictment, or any part thereof, 6 to 20, 18 to 20, 12 to 20, and that these sentences could run one right after the other.

Do you understand that?

DEFENDANT MAYNARD: Yes.

THE COURT: And that the sentence in the armed robbery case could run after that. These are what we call consecutive sentences. Do you understand that?

DEFENDANT MAYNARD: Yes.

THE COURT: I take it, then, that you are telling me through your attorneys Mr. Zwick and Mr. Wolff that you wish to waive your right to a trial by jury and enter a plea of guilty to these charges, knowing the possible penalties, is that right?

DEFENDANT MAYNARD: Yes.

With this response from Maynard, the trial judge explained to him the difference between a trial by jury and one by a judge. He was told of the obligation the State had to prove him guilty beyond a reasonable doubt, of his right to confront witnesses against him, of his right to cross-examine witnesses and his right against self-incrimination. The trial judge told him that by pleading guilty he was waiving all of these rights. Then, the judge asked Maynard if his plea was free and voluntary. He answered, "Yes, sir." Following this answer, the plea bargain was explained to him: in return for his plea of guilty, he was to be found guilty of voluntary manslaughter under Counts I and II and guilty of armed robbery under Count IV; the sentence was to be a concurrent one of not less than 7 nor more than 20 years. Maynard was asked if he understood the sentence and if he was willing to accept it. His answer was "Yes." Donnell was then admonished, as had been Maynard, and the trial judge inquired if there was a stipulation between the parties concerning the facts. Counsel for both sides said there was. Thereupon, the assistant state's attorney told the court it was agreed that

witnesses for the State would testify that on August 8, 1971, sometime between 3:00 and 8:10 a.m., the defendants Maynard and Donnell were in the vicinity of an "L" station, 5036 North Winthrop Avenue in the City of Chicago; that Lorraine Morey and Ray Morey saw them there in the company of Albert Daniel Burkhard, the crime victim; that the defendants were near Burkhard, who was on the ground with one of the defendants holding back the other, that one was telling the other to leave Burkhard alone and not bother him anymore; that May Hicks saw a knife in the possession of one defendant; and that other witnesses, in addition to those specifically named, would testify and furnish evidence sufficient to prove the defendants guilty beyond a reasonable doubt. The parties also stipulated to the cause of Burkhard's death, to the alcoholic content of his blood, to venue, to Maynard's age, and to the legal sufficiency of the indictment. When the prosecuting attorney had stated the stipulation, the trial judge inquired of defense counsel if there was anything further concerning it. His answer was "Nothing further." The trial judge, in accordance with the plea bargain, found Maynard guilty of the lesser included offense of voluntary manslaughter under Counts I and II of the indictment and of armed robbery under Count IV. A hearing in aggravation and mitigation followed.

This revealed that in 1969 Maynard was arrested for strong-arm robbery; but the charge was reduced to petty theft and he was put on probation. In June 1970, he pled guilty to armed robbery and was put on two years probation. After reviewing these facts and hearing from Maynard's counsel, the court inquired and the prosecution made the recommendation which had been agreed upon in the plea bargain: namely, that Maynard be sentenced to serve out not less than 7 nor more than 20 years. The recommendation was accepted; and the court sentenced Maynard to the term of 7 to 20 " * * * on Counts I, II and IV of the indictment, on the crimes of voluntary manslaughter and armed robbery."

In this appeal by Maynard only, two issues are presented for our review. 1. Whether the trial court's admonishment which told him that he could be sentenced to consecutive sentences on the murder charges, or on the lesser included offenses of voluntary manslaughter although only one victim was involved was prejudicially erroneous because it had the effect of coercing him to plead guilty to the crimes with which he was charged. 2. Whether, as required by Supreme Court Rule 402 (c), the trial judge determined, before entering final judgment on the pleas of guilty, that a factual basis for the pleas existed.

I.

In our judgment, the trial judge was mistaken when in admonishing Maynard he told him that on the two counts of murder, either as such or as reduced to two counts of voluntary manslaughter, and on the one count of armed robbery, multiple and consecutive sentences could be imposed. There is nothing in the record to suggest that the offenses charged in the counts were separable and distinct. In fact, all of the alleged offenses were against one victim, committed on one occasion, and from all that appears, arose out of one conduct. Where an indictment charges in multiple counts different theories by which one person was murdered by one conduct, a sentence on each count cannot be imposed. (People v. Robinson, 106 Ill. App. 2d 78, 86, 246 N. E. 2d 15.) And where, as in this case, a plea bargain produces nolle prosequi of one murder count and reduction of two charges to voluntary manslaughter, all counts merely describing theoretically different killings of the same person at the same time, only one conviction can be entered and only one sentence can be imposed. (People v. Holiday, ___ Ill. App. 3d ___, 316 N. E. 2d 236.) Where a defendant is charged with both a felony and murder that results from its commission, there being no evidence that the two crimes were separate and distinct, he cannot be sentenced for both the felony and the murder.

(People v. Hill, 6 Ill. App. 3d 746, 286 N. E. 2d 764.) The only permissible sentence is one that punishes the more serious offense. (People v. Peery, 81 Ill. App. 2d 372, 225 N. E. 2d 730.) For these reasons, there could be in this case only one conviction for the most serious crime charged; and, of course, there could be only one sentence. See People v. Lilly, 56 Ill. 2d 493, 309 N. E. 2d 1; People v. Tiffin, 16 Ill. App. 3d 367, 306 N. E. 2d 325; Ill. Rev. Stat. 1971, ch. 38, par. 1-7(m); compare People v. Page, 15 Ill. App. 3d 1008, 305 N. E. 2d 666.^{3/}

The mistake of the trial judge, however, did not make the admonition coercive. Throughout the proceedings, Maynard had the benefit of counsel who could, but did not, express any objection to the remarks of the trial judge. For Maynard's benefit, a plea bargain had been negotiated, one which he repeatedly said was acceptable to him. A defendant's fear that a more severe sentence could be imposed does not render his plea of guilty involuntary, unless the fear resulted from improper conduct by the authorities. See North Carolina v. Alford (1970), 400 U. S. 25, 27 L. Ed. 2d 162, 91 S. Ct. 160; People v. Scott, 43 Ill. 2d 135, 251 N. E. 2d 190; compare People v. Brown, 41 Ill. 230, 242 N. E. 2d 242. A mistake by the trial judge as he articulates the principles of sentencing is not improper conduct. The admonition of a criminal defendant if for the purpose of conveying to him the consequences of his plea of guilty and allow him the right to withdraw it if, after hearing the consequences, he desires to be tried by a jury. (People v. Wilke, 390 Ill. 598, 62 N. E. 2d 468; People v. Kontopoulous, 26 Ill. 2d 388, 186 N. E. 2d 312; People v.

^{3/} The decision in Lilly was announced by the Supreme Court after Maynard's trial. His appeal to this court was pending at the time; therefore, the concepts of sentencing that were clarified in that case are binding in this one.

Avery, 16 Ill. App. 3d 986, 307 N. E. 2d 213.) This purpose was achieved in the case before us. Therefore, the admonition given Maynard was not prejudicially erroneous; nor did it have the effect of coercing his pleas of guilty.

II.

Paragraph (c) of Supreme Court Rule 402 provides that "[t]he court shall not enter final judgment on the plea of guilty without first determining that there is a factual basis for the plea." The factual basis for a guilty plea consists either of a defendant's express admission that, with the requisite mental state, he committed the acts alleged, or a recital to the court of evidence which will support the allegations of the charge. (People v. Greene, 12 Ill. App. 3d 418, 299 N. E. 2d 535.) The rule does not specify any particular method of inquiry into the factual basis for a guilty plea. Therefore, the trial judge may utilize any appropriate procedure which will assure a record demonstrating the existence of facts that would justify acceptance. (People v. Dugan, 4 Ill. App. 3d 45, 280 N. E. 2d 239.) The basis for a plea is shown when there is reasonable ground for the conclusion that the defendant, with the requisite mental state, committed the acts constituting the offense to which he pleads guilty. It is not necessary that this be shown beyond a reasonable doubt or even by a preponderance of the evidence. People v. Hudson, 7 Ill. App. 3d 800, 288 N. E. 2d 533.

The record before us shows that as part of the pre-trial proceedings, the State had furnished defendants with a list of 41 witnesses: 27 private citizens, 12 Chicago policemen, 2 crime laboratory technicians and a Cook County morgue pathologist. Significantly, most of the citizens lived near the scene of the crime. When the case was called for trial, defense counsel told the court that the State had discovered new evidence, a fact he had not discussed with the defendants. The trial judge instructed the

lawyer to discuss the matter with his clients and with the prosecuting attorneys. Discussion among counsel followed; and as a result, the plea bargain was made, including a stipulation concerning the facts. An assistant state's attorney summarized the agreed facts; and after mentioning that certain named State witnesses would connect Maynard and Donnell with the assault on Albert Daniel Burkhard, the victim of the crime, the court was told the parties had agreed " * * * that other witnesses, in addition to those specifically named would testify and furnish evidence sufficient to prove the defendants guilty beyond a reasonable doubt." No specifics concerning the testimony of these witnesses were mentioned. Then, after the assistant state's attorney had recited the stipulation, the trial judge asked defendant's counsel if he had anything to say. The lawyer said he did not. It is now contended by Maynard that a factual basis for the pleas of guilty is not shown in the record because the stipulation did not include all the elements of voluntary manslaughter;^{4/} nor did it specifically mention the elements of armed

4/ Ill. Rev. Stat. 1971, ch. 38, par. 9-2 provides that "[a] person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

- (1) The individual killed, or
- (2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed.

Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

(b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable.

* * *

robbery.^{5/}

Plea bargaining is desirable in the administration of our criminal laws. (People v. Pier, 51 Ill. 2d 96, 281 N. E. 2d 289.) It should be implemented whenever it is not contrary to the interests of justice. (People v. Watland, 4 Ill. App. 3d 845, 281 N. E. 2d 435.) And it is not looked upon with disfavor by the law. (People v. Cheshier, 3 Ill. App. 3d 523, 278 N. E. 2d 93.) However, it would render plea bargaining a mockery, if a guilty plea is set aside for lack of factual basis after the defendant is furnished a full list of witnesses, he admits in open court through his counsel that the State has new evidence against him and he enters into a stipulation in which he agrees with the prosecution that it had witnesses who when called would testify to evidence sufficient to convict him beyond a reasonable doubt. Therefore, we conclude, that as required by Supreme Court Rule 402 (c), the trial judge determined before entering final judgment on Maynard's pleas of guilty that a factual basis for the pleas existed.

III.

For the reasons given in this opinion, we affirm the judgment and sentence entered on Maynard's plea of guilty to armed robbery under Count IV of the indictment. We vacate the judgments entered under Counts I and II. People v. Lilly, 56 Ill. 2d 493, 309 N. E. 2d 1.

Judgment under Count IV affirmed:
Judgments under Counts I and II
vacated.

Hayes, P. J., and Downing, J., concur.

^{5/} Ill. Rev. Stat. 1971, ch. 38, par. 18-2, provides that "[a] person commits armed robbery when he [takes property from the person or presence of another by the use of force or by threatening the imminent use of force] while armed with a dangerous weapon."



59547

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
	)	Appeal from the Circuit Court
)	
v.)	
	)	of Cook County.
)	
JEFFERY LOVE,)	
)	
Defendant-Appellant.	)	Louis B. Garippo, J.

BEFORE McNAMARA, P.J., and DEMPSEY and McGLOON, JJ.

PER CURIAM:

Jeffery Love was found guilty after a bench trial of the crime of aggravated battery in violation of Section 12-4 of the Criminal Code (Ill.Rev.Stat., 1973, ch. 38, par. 12-4). He was sentenced to a term of one to three years. He appeals.

At the hearing on the motion to quash defendant's arrest and to suppress evidence, and at trial, the following evidence was adduced: Perry Truitt testified that on January 19, 1973, at approximately 2 P.M., he was standing in front of the building at 4838 West Adams, where he worked as a janitor, when he saw Delores Gayton accompanied by the defendant and two other men. Truitt testified that he had seen the defendant on many prior occasions when the defendant would visit Delores Gayton, who lived in the building. Delores Gayton accused Truitt of having her husband arrested. At that time the defendant and the two other men knocked Truitt to the ground and hit him in the head with a club. The defendant kicked Truitt in the ribs. All three men then fled. Truitt testified that after the men left, he got up and went down to the

corner where he identified the defendant and two other men who were then seated in the rear of a squad car. Truitt was taken to St. Anne's Hospital where he remained for approximately one month.

Frank Gallardo, a Chicago police investigator, testified that on January 19, 1973, at approximately 2:45 P.M., he responded to a radio call of shots being fired in the 4800 block of Adams. As he approached, he observed the defendant and two other men running approximately two to three hundred feet from that location. He stopped the men and after inquiring as to why they were running, he placed them under arrest. Officer Gallardo conducted a pat down search but no weapons were recovered. Three men were placed in the rear seat of the squad car and they proceeded to the 4800 block of Adams. There, Perry Truitt identified the three men seated in the squad car as the men who had beaten him.

Defendant testified that on January 19, 1973, at approximately 2 P.M., he was walking down the street with two friends in the vicinity of Monroe and Cicero Streets, Chicago, Illinois, when he was stopped by the police and placed under arrest. Defendant admitted that he knew Truitt but denied that he had hit or kicked him.

Defendant's only argument on appeal is that the trial court erred when it denied the motion to quash his arrest and to suppress the identification testimony flowing therefrom as fruit of the poisonous tree. The State concedes the illegality of defendant's arrest but argues that the identification testimony was still admissible.

The illegality of an arrest does not ipso facto require the suppression of all evidence that follows the arrest. Wong Sun v.

United States (1963), 371 U.S. 471. This court has held that the identification of a defendant following an illegal arrest does not necessarily require the identification to be suppressed. People v. Pettis (1973), 12 Ill.App.3d 123, 298 N.E.2d 371; People v. Brown (1973), 15 Ill.App.3d 606, 304 N.E.2d 662.

Perry Truitt testified that he had seen the defendant on many occasions. This part of Truitt's testimony was corroborated by that of the defendant. Further, Truitt testified that prior to and during the incident, he had ample opportunity to view the defendant so as to fix his identity. Truitt's in court identification had a basis independent of and was not a direct result of defendant's arrest. Under this circumstance, Truitt's in court identification was properly admitted into evidence at the trial.

A review of Truitt's trial testimony demonstrates that it was sufficient to establish defendant's guilt beyond a reasonable doubt. Accordingly, the judgment of the Circuit Court of Cook County is affirmed.

Judgment affirmed.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable GLENN K. SEIDENFLED, Justice
Honorable L.L. RECHENMACHER
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On December 5, 1974 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

FILED

DEC 5 1974

No. 73-61

LOREN J. STROTZ, Clerk pro tem
Appellate Court, 2nd District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court of the Sixteenth
v.	)	Judicial Circuit, Kane
	)	County, Illinois.
WILLIAM H. STINGER, JR.,)	
)	
Defendant-Appellant.)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

Defendant, William H. Stinger, Jr., pleaded guilty to indictments charging him with murder, attempt murder, and armed robbery. Before sentence was imposed at a subsequent hearing, defendant's motion to withdraw his plea was denied. He was sentenced to 20-30 years for murder; 15-20 years for attempt murder; and 5-20 years for armed robbery, all sentences to run concurrently. He appeals, contending that the judge who accepted his plea of guilty failed to comply with Supreme Court Rule 402(a) (Ill.Rev.Stat. 1971, ch. 110A, par. 402(a)); that he was denied the effective assistance of counsel and that the court erred in denying his motion to withdraw his plea.

We first conclude that the defendant was admonished in substantial compliance with Supreme Court Rule 402 prior to the entry of his guilty pleas. Specifically, defendant contends that the court did not personally determine whether he understood the nature of the charges against him and the possible minimum and maximum sentences. Defendant also contends that the court did not advise

him of his right to plead not guilty. It appears, however, from our review of the record, that the defendant was advised of his right to a jury trial or a trial before the court, of his right to confront witnesses against him and was informed that he would be waiving these rights if he pleaded guilty. Upon the judge's request, the State's Attorney indicated the specific charges against the defendant in accordance with the copy of the indictment which had been furnished to the defendant, and proceeded to recite an extensive factual basis in support of each of these charges. In conjunction therewith, the prosecutor also noted the defendant's full confessions to each of these charges. The minimum and maximum penalties were subsequently stated both by the judge and the State's Attorney in defendant's presence in open court and the possibility of consecutive as opposed to concurrent sentencing on the separate crimes charged was also discussed. Furthermore, the defendant was asked by the court whether any threats or promises were made to induce his plea and he answered in the negative.

During the proceeding the public defender was asked by the court to relate his understanding of the negotiations that had taken place. From his description in the record it appears that agreement had been reached on the minimum sentences but that there had been no agreement on the maximum sentences. The court concurred in the recommendation of the public defender and indicated that upon a plea of guilty defendant would be sentenced to 20-30 for the offense of murder, 5-20 for armed robbery and 15-20 for attempted murder and that all would be concurrent. The court inquired into defendant's understanding of this and received an affirmative response.

In our view there was substantial if not exact compliance with Supreme Court Rule 402. Moreover, there is no claim that

the plea was not voluntary, no evidence that the defendant was harmed or prejudiced, and no showing that the court's proposed sentence was not specifically and completely honored. Under these circumstances any error in the procedure would be insufficient to reverse the judgment of conviction since it appears that real justice has been afforded. See People v. Dudley (1974), 316 N.E.2d 773, 774-775; People v. Krantz (1974), 317 N.E.2d 559, 562-563.

Defendant's contention that he was denied effective assistance of counsel is equally without basis in the record. He argues principally that he was misled by his appointed counsel who allegedly failed to advise him that he had no right to appeal from the denial of his pre-trial motion to suppress his confession in the event he pleaded guilty. Additionally, it is argued that because of this circumstance, appointed counsel could not properly represent the defendant at the hearing on the motion to withdraw the plea and that this also deprived defendant of the effective assistance of counsel.

To establish lack of competent representation it is necessary to demonstrate actual incompetence of counsel as reflected by the manner of carrying out his duties which results in substantial prejudice without which the outcome would probably have been different. (People v. Goerger (1972), 52 Ill.2d 403, 409.) The charge of incompetency cannot be based on mere assertions. People v. Ashley (1966), 34 Ill.2d 402, 411-12; People v. Richardson (1974), 16 Ill.App.3d 830, 832.

Defendant has failed to establish incompetency of counsel as so defined. It appears from the record that in addition to arguing numerous motions in this cause, appointed counsel actively and competently represented the defendant at the preliminary hearing, the hearing on the motions to suppress, the plea hearing, the hearing on the motion to withdraw the plea and at sentencing.

Counsel's assessment of the probable outcome of a trial if defendant did not enter a plea of guilty was neither misleading nor properly construed to have been evidence of incompetence or coercion as claimed by defendant. (See People v. Thomas (1972), 51 Ill.2d 39, 45.) Defendant's further argument that appointed counsel was unable to argue his own incompetency at the hearing on the motion to withdraw the plea and that he was thus guilty of a conflict of interest is also of little merit. We have already determined from our review of the record that there is no basis for the charge of incompetency and it is well established that a claim of conflict of interest cannot be based solely on mere assertions but must be shown to actually exist. See People v. Chapman (1965), 66 Ill.App.2d 124, 127.

Defendant next argues that he should have been permitted to withdraw the plea of guilty entered on October 16th because of a misapprehension of the law. (See People v. Phelps (1972), 51 Ill. 2d 35; People v. Brown (1969), 41 Ill.2d 503.) He claims that when he entered his guilty plea he was under the impression that he could still appeal the denial of his previous motion to suppress. The point was argued by counsel during the hearing on the motion to withdraw and defendant argues that from this it can be inferred that his subjective misapprehension of the law was the result of a misrepresentation of the law by his counsel. This, however, does not appear to be either a necessary or reasonable inference. It is apparent from the record that counsel was forthrightly presenting defendant's claims to the court in seeking to have the plea of guilty withdrawn, but there is little basis in the record for the inference that counsel misrepresented the law to the defendant or that this was a factor in the guilty plea.

Defendant's related argument that the court should have, by further inquiry, discovered that he was under a misapprehension

of his legal rights at the time he pleaded guilty, is also unpersuasive in view of the record. It appears from the colloquy between the court and the defendant that in accepting defendant's plea of guilty the court advised him that he would have the right to appeal his conviction after sentencing. Defendant's response in no way indicated that he misapprehended the fact that he could not appeal from other matters preliminary to the plea.

While the issue is not directly presented in defendant's brief, we find it somewhat puzzling that the judge who accepted the guilty plea subsequently recused himself and that the hearing on the motion to withdraw the plea was before another judge who thereafter sentenced the defendant. It appears from the record that the judge who accepted the plea was aware that some negotiations had taken place and that he had, in fact, participated in certain of the related discussions. It also appears from the record that there had been some type of agreement as to the minimum sentences to be imposed. In accordance therewith the trial court indicated that it would sentence the defendant on his plea of guilty to the terms recommended by defense counsel. Those terms, expressly stated by the trial court, were the same as the terms finally imposed by the sentencing judge after the denial of the motion to withdraw the guilty plea. There appears to have been no plea agreement in the ordinary sense, however, as a basis for the guilty plea.

Defendant claims, in asserting the incompetency of his counsel, that he was led to believe that after entering his guilty plea he would be able to further negotiate his sentence. This argument, however, finds little support in the record and is further weakened by the clear lack of prejudice shown. The sentences imposed were moderate considering the nature of the crimes committed and the absence of any defenses thereto. The fact that the

motion for a withdrawal of the plea was made before a judge other than the one who accepted the guilty plea does not appear to have prejudiced the defendant since his plea was entered in the belief, so far as the record shows, that he would be sentenced to the terms he actually received. See People v. Spicer (1970), 47 Ill. 2d 114, 117.

Whether a plea of guilty may be withdrawn is within the sound discretion of the trial court. The exercise of this discretion will not be disturbed unless it appears that a guilty plea was entered through a misapprehension of facts or law, that the defendant has a defense worthy of consideration, and that justice would be better served by a trial. (People v. Spicer, 47 Ill.2d 114, 116.) We find no abuse of discretion in the trial court's denial of defendant's motion to withdraw his guilty plea in this case.

We therefore affirm the judgments below.

Affirmed.

THOMAS J. MORAN, P. J. and RECHENMACHER, J. concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable L. L. RECHENMACHER, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On December 26, 1974 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED

DEC 26 1974

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.) Appeal from the Circuit
) Court of the 17th Judicial
CHARLES PRITCHETT,) Circuit, Winnebago County,
) Illinois.
Defendant-Appellant.)

MR. JUSTICE RECHENMACHER delivered the opinion of the court:

Defendant was convicted of murder and burglary by a jury and sentenced to concurrent terms of 20 to 30 years for the murder and 5 to 15 years for the burglary to be served in the penitentiary.

The issues presented by defendant on appeal are:

- (1) whether the court erred in denying his pre-indictment motion to have the grand jury proceedings recorded, transcribed and made available to him; (2) whether the failure of his appointed counsel to raise issues as to the legality of the defendant's arrest and confession by his appointed counsel constituted incompetent representation which deprived the defendant of due process of law, and (3) whether he was proved guilty beyond a reasonable doubt.

On the morning of July 8, 1971, the body of William Shoemaker, custodian of the First Presbyterian Church of Rockford, was found lying in a pool of blood on the second level of the church building.

The police found an empty wallet in the apartment of the deceased on the third level of the church. On February 1, 1972, James Pritchett (defendant's brother), and one William Davenport were indicted for burglary and the murder of Mr. Shoemaker. On August 1, 1972, the charges against Davenport were dismissed and a complaint was filed alleging that defendant, Charles Pritchett, had committed the offense of murder and the arrest warrant was issued on that day.

On August 4, at about 2:00 a.m. the defendant was arrested in his Chicago apartment and taken to a Chicago police station. He testified, in substance, that when he got there he was placed in a room and handcuffed; that the officers who placed him in the room did not talk to him except to ask questions as to his general background for the purposes of filling out an arrest form sheet. Rockford Police Detectives Price and Gray arrived about 5:45 a.m. They read to defendant his constitutional rights and defendant signed the rights' waiver form. They questioned him for about 15 minutes about his personal background; then turned to the homicide of Mr. Shoemaker. Defendant first denied any involvement but after about an hour and a half he admitted his participation. The writing up of defendant's formal statement began at 7:30 a.m. and it was concluded and signed by the defendant at 9:22 a.m.

Defendant was taken to Rockford arriving there about 2:00 p.m. He then went with the detectives to the church. There is testimony that he indicated the door he and his brother "Jimmy" entered on the night of the crime and the other places and areas which were familiar to him. They then returned to the Detective Bureau of the Rockford Police Department. The defendant was given a cup of coffee and sandwiches. He then related further details of the occurrences on that night

after their entry into the church building.

In defendant's written statement which was admitted into evidence at the trial he stated that he and his brother, "Jimmy", had broken into the church and while they were upstairs going through desk drawers a man grabbed the defendant, "then Jimmy Pritchett, my brother, hit him"; thereupon defendant fled and upon seeing "Jimmy" later he noticed blood on "Jimmy's" shirt.

At the trial Mary Davis and her brother, Marshall Davis, testified in substance that on the evening of July 7, 1971, in their presence the defendant's brother, "Jimmy" Pritchett, said that he and "Billy" (Davenport), used to break into churches; that at about 10:00 or 10:30 p.m. defendant and "Jimmy" decided to break into one, looked in the telephone book, tore out a page and defendant said "I found one, let's go", and left. Defendant and "Jimmy" returned at about 2:00 or 2:30 a.m. Mary Davis testified she saw blood on defendant's and "Jimmy's" clothing but that the most blood was on the defendant; defendant then used a towel to wipe off the blood and threw the towel in the garbage in the kitchen. Marshall Davis also testified that he saw some blood on them when they returned. Mary testified that in the morning the defendant and "Jimmy" told her and others present (Marshall's wife, Barbara, and Delores Dotson, defendant's girl friend) about what had happened, and that "Jimmy" said that "the man grabbed Charles (the defendant) and Charles hit him," and that then "they said that 'they couldn't let that old bastard get away with it'."

On cross examination both witnesses admitted that at James Pritchett's trial in June, 1972 (See People v. Pritchett (1974), ____ Ill. App. 3d ____ docket No. 72-383) they had testified that "Jimmy's" accomplice was Billy Davenport (and that they did not name defendant, Charles Pritchett, as the accomplice until July 1972). However, Mary Davis testified that she failed to name defendant then because she "was scared". Marshall Davis testified that he did not name defendant then "because Charles (the defendant) got some friends and I was afraid something might happen to my family or * * * to me".

Defense witnesses testified in effect that between July 4 and July 8, 1971, defendant was in Chicago. The defendant and Mr. Edwin Anderson stated also that defendant was assisting Mr. Anderson in painting his home on July 6 and 7. The jury returned verdicts of guilty for the offenses of murder and burglary against the defendant and the court imposed the concurrent sentences referred to above.

Eleven days after the defendant was arrested and before he was indicted by the grand jury, defendant presented his motion to require that the grand jury proceedings be recorded and that a transcript thereof be made available to him. His petition stated that he apprehended that the witnesses who testified against William Davenport before the grand jury when Davenport was indicted for the same offenses (which indictment was later dismissed) would also testify against defendant, Charles Pritchett, and that defendant would be irreparably injured in preparing his defense without access to such testimony and to relevant exhibits.

Defendant relies on People v. Sears (1971), 49 Ill. 2d 14, in which the Illinois Supreme Court held that the trial

court has authority to order a transcript of grand jury proceedings to be presented to that defendant before the return of the indictment. However, in Sears the grand jury proceedings had already been recorded and transcribed. In a later case, People v. Lentz (1973), 55 Ill. 2d 517, the Illinois Supreme Court held that Supreme Court Rule 412 (Ill. Rev. Stat. 1971, ch. 110A, par. 412) was only intended to allow the defendant access to a transcript of grand jury testimony if such transcript existed, and affirmed our decision (8 Ill. App. 3d 41) reversing a dismissal of an indictment because of the State's failure to have the grand jury proceedings recorded. We are not persuaded by the holding in U.S. v. Price (1973), 474 F. 2d 1223, or other decisions of the Court of Appeals for the Ninth Circuit, particularly in view of the decisions of other federal courts referred to in Lentz which interpret the comparable Federal Rule 6(e) of Criminal Procedure (18 U.S.C.A. Fed. R. Crim. P. 6(e)) as not requiring grand jury proceedings to be transcribed.

Moreover, it should be pointed out that in the instant case defendant's apprehension that he would be prejudiced in the absence of a transcript because Mary and Marshall Davis would testify against him before the grand jury, proved to be unfounded in view of the fact that the only witnesses who appeared before the grand jury which returned the indictment against him were 2 Rockford detectives.

Defendant argues that his counsel was incompetent because he failed to move to suppress the defendant's confession on the ground that his arrest in Chicago was based on a defective warrant. The record discloses that defendant's appointed counsel did move to suppress his confession challenging its voluntariness rather than the propriety of his arrest.

His counsel presented and argued defendant's pre-indictment motion to require the grand jury proceedings to be recorded and the transcript made available to him. Defendant's counsel ably and vigorously cross examined the State's witnesses and presented 9 witnesses, including defendant, who testified as to defendant's alibi defense. His appointed counsel was anything but incompetent; on the contrary he exhibited a high degree of competence. In any case the failure of his counsel to file a motion to suppress did not constitute inadequate representation. See People v. Robinson (1960), 21 Ill. 2d 30.

The failure to move to suppress the confession on the ground that he had been illegally arrested is a waiver of that issue. (See In re Lamb (1974), 21 Ill. App. 3d 827 and cases cited therein.) In Lamb the court fully considered the question of the effect on a confession of defendant's illegal arrest and stated as follows, p. 832:

"* * * Illinois courts have consistently held that illegal detention, per se, does not render a confession inadmissible but, rather, that it is but one 'circumstance to be considered as to the voluntary character' of the confession. (Citations.) The point to be made is that the extent of judicial suppression of evidence in order to deter illegal police conduct must be bounded by reason; it must not be a 'punitive and extravagant application of the exclusionary rule' (Citation); and to hold that all evidence following an illegal arrest is ipso facto inadmissible would deprive law enforcement officers of not only the 'fruit of the poisonous tree,' but, to extend the metaphor, the wood, the leaves and even the shade as well. We believe, therefore, that the better rule would regard an illegal arrest like an illegal detention, a circumstance to be considered as to the voluntary character of the statement; and the arrest here will be so considered * * *."

We therefore hold that even if defendant could be

said to have been illegally arrested his confession in the case at bar was legally admissible. However, our examination of the record reveals nothing that would suggest that defendant's arrest was based on a defective warrant or carried out by officers who did not have probable cause to believe that defendant committed the crimes for which he was convicted by the jury.

Finally, defendant argues (on the assumption that his confession was inadmissible) that the "unreliable testimony" of Mary and Marshall Davis was not sufficient to prove defendant guilty beyond a reasonable doubt, particularly in light of the alibi testimony. We have already decided that defendant's confession was legally admissible. Mary and Marshall Davis testified that each of them had earlier put the blame on Davenport rather than on defendant, Charles Pritchett, because Mary was "scared" and Marshall was afraid that defendant had some friends who might do something to him or his family. As to defendant's alibi witnesses the jury obviously had reason not to believe them. The credibility of alibi witnesses and the weight to be afforded their testimony is a question for the trier of fact, and the jury's decision to disbelieve them was amply justified by the record. (People v. Hayes (1973), 14 Ill. Ill. App. 3d 248, 252.) The jury determined the defendant was guilty beyond a reasonable doubt of murder and burglary. Our examination of the record discloses that the evidence was sufficient to support the jury's verdict.

Therefore, the judgment of the circuit court of Winnebago County is affirmed.

Judgment affirmed.

GUILD and SEIDENFELD, JJ., concur. ____

24 I.A.^{3D} 582

(24540—4M—9-70) 160-o



STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE LELAND SIMKINS, Presiding Judge

HONORABLE JAMES C. CRAVEN, Judge

HONORABLE HAROLD F. TRAPP, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 5th day
of December A. D. 19 74, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 12570

Agenda 74-186

GLORIA DAUTEN,)	
)	
Plaintiff-Appellee)	
	)	Appeal from
v.	)	Circuit Court
	)	Champaign County
KATHLEEN BAILEY,	)	73-S-64
)	
Defendant-Appellant)	

Mr. JUSTICE CRAVEN delivered the opinion of the court:

Gloria Dauten, plaintiff, brought suit in small claims against Kathleen Bailey, defendant, upon a written lease to recover rents due for the months of September through December of 1972 and January of 1973. After a bench trial, judgment was entered in favor of plaintiff in the amount of \$948. Defendant appeals and urges that the judgment of the trial court was erroneous.

The facts of this litigation are as follows. The defendant, a graduate student at the University of Illinois, executed a written lease on June 5, 1972, with the plaintiff for the rental of an apartment located in Champaign, Illinois. The lease provided that the tenancy would run for 11-1/2 months, commencing September 1, 1972, at a rate of \$237 per month. In

late August of 1972, defendant notified plaintiff that she did not intend to honor the lease agreement. Both parties attempted to sublet the apartment. Defendant acted pursuant to paragraph 7 of the lease, which required her to present a suitable sub-tenant to the lessor in the event the premises should be vacated during the term of the lease.

On or about September 10, 1972, the defendant contacted Mary Lynch for the purpose of having Miss Lynch sublet the apartment. Miss Lynch visited the apartment complex wherein defendant's apartment was located. She inquired at plaintiff's business office concerning the status of the apartment, and, in the presence of plaintiff, was advised that the apartment was going to be rented to another party. Miss Lynch was also informed that the third party who intended to sublet the apartment in question had not signed the subletting contract as of that time. Miss Lynch was further advised that there were several other apartments available in plaintiff's apartment complex which she could lease. She eventually executed a lease with plaintiff for another apartment and so advised defendant and one other individual, who had also been interested in sharing the apartment with her, that plaintiff had rented the apartment. Consequently, defendant made no further efforts to relet the apartment.

The group of individuals that was going to occupy the apartment in question failed to execute the subletting contract. The apartment remained vacant until it was leased by plaintiff on February 1, 1973, for the balance of the term.

Defendant urges several theories of relief in her brief. However, we find that this case is governed by the lease executed between defendant and plaintiff. Since defendant chose not to honor the lease by not commencing her tenancy, the burden was upon her to present plaintiff with a suitable sub-tenant as required in paragraph 7 of the lease. Plaintiff was bound to accept a suitable sub-tenant in mitigation of her damages. We find that defendant complied with paragraph 7 to the best of her ability, and that plaintiff did not.

When Miss Lynch presented herself to plaintiff, plaintiff was required to accept her as a sub-tenant if she was found to be suitable. The fact that Miss Lynch was suitable is established by the fact that plaintiff rented another one of her apartments to Miss Lynch. Defendant's efforts to comply with paragraph 7 of the lease was effectively thwarted when plaintiff's agents informed Miss Lynch that the apartment was in all probability subletted, and then proceeded to lease her another one of plaintiff's apartments. Defendant's efforts were undermined by this line of conduct and accordingly defendant was relieved of any further responsibility under the lease.

The judgment of the circuit court is reversed.

JUDGMENT REVERSED.

SIMKINS, P.J., AND TRAPP, J., concur.

74-384

People vs. Buford Adcock

STATE OF ILLINOIS



APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,
on the 1st Day of January in the Year of our Lord one thousand
nine hundred and seventy-four, within and for the Third District
of Illinois:

Present— PC

HONORABLE ALBERT SCOTT, Presiding Justice

HONORABLE ALLAN L. STOUDE, Justice

HONORABLE JAY J. ALLOY, Justice

HONORABLE WALTER DIXON, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on
December 23, 1974 the Opinion of the
Court was filed in the Clerk's Office of said Court, in the words
and figures following, viz:

In The
APPELLATE COURT OF ILLINOIS

Third District

A. D. 1974.

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Will County
)	
vs.)	
)	
BUFORD ADCOCK,	)	Honorable
	)	Michael Orenic
	)	Presiding Judge
Defendant-Appellant.)	

PER CURIAM

Abstract

This is an appeal from a judgment of the Circuit Court of Will County which found defendant guilty, after a jury trial, of the offense of armed robbery. Defendant was sentenced to a term of from 15 to 25 years in the penitentiary. The office of the State Appellate Defender was appointed to represent defendant in the appeal in this Court. Such Appellate Defender has now moved for leave to withdraw as counsel on appeal in accordance with the precedent in Anders v. California, 386 U.S. 738. The Appellate Defender asserts, after a careful examination of the record, that the conclusion must be reached that an appeal would be wholly frivolous and without possibility of success. The motion for leave to withdraw was accompanied by a brief in support of counsel's conclusion.

The record indicates that defendant Buford Adcock filed a petition for post-conviction relief which was amended by his court-appointed counsel. After an evidentiary hearing, the trial court denied the petition and found that the evidence did not reveal that Adcock was deprived of any substantial constitutional right during his trial proceedings. The petition filed by Adcock was founded upon a claim that he was deprived of due process of law by reason of the State's failure to disclose all evidence favorable or material to his defense in response

to his pre-trial discovery motion. The testimony heard by the trial court at the evidentiary hearing revealed that, prior to Adcock's trial, the Will County Sheriff's office had received a report on one of the State's two principal witnesses, a James Thorn which showed that the name "James Thorn" was an alias and that the witness had a prior burglary arrest, but no conviction thereon. This report was not disclosed by the State to defendant Adcock prior to trial, as the prosecutor was apparently unaware of its existence. Adcock contended that this report would have enabled him to impeach Thorn at the trial. While we agree that suppression by the State of evidence favorable to a defendant and material to his guilt or punishment is violative of due process (Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215), and that all favorable police reports must be disclosed whether or not they are made a part of the prosecutor's file (People v. Dixon, 19 Ill. App. 3d 683, 312 N.E. 2d 390), the Sheriff's report in this case should have been disclosed to Adcock if it was favorable or material to his defense.

We note that the Sheriff's report on "James Thorn" did not list any prior conviction but merely that his legal name was other than "James Thorn" and that he did have a prior burglary arrest. As has been indicated in the Supreme Court of this State in People v. Hoffman, 399 Ill. 57, 77 N.E.2d 195, the credibility of a witness is not presumed to be affected by anything less than a conviction of an infamous crime. The Sheriff's report, therefore, would not have enabled Adcock to impeach Thorn's testimony. As a consequence, the Sheriff's report did not constitute evidence which was favorable or material to Adcock's defense under the facts developed in the instant case.

A petitioner has the burden of proving, by a preponderance of the evidence, that he was deprived of substantial constitutional right during the trial proceeding (People v. Stovall, 47 Ill. 2d 42, 264 N.E.2d 174, cert. den. 402 U.S. 997, 91 S.Ct. 2183, 29 L. Ed.2d 164). On the basis of the record, Adcock did not prove that the evidence which was assertedly suppressed by the State was favorable or material to his defense. The order of the trial court dismissing the petition of Adcock was, therefore, correct.

In view of the record in this cause, we concur in defense counsel's conclusion that there is no basis for maintaining an appeal in this cause and that a continuation of the appeal would be wholly frivolous and could not possibly succeed. The judgment of the Circuit Court of Will County is, therefore, affirmed and the motion of the State Appellate Defender to withdraw as counsel for defendant, Buford Adcock, is allowed.

Judgment affirmed and
Withdrawal Motion allowed.

24 I.A.^{3D} 678

(24540-4M-9-70) 160-c



STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE HAROLD F. TRAPP, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 17th day
of December A. D. 1974, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 12197

Agenda No. 74-3

THE PEOPLE OF THE STATE OF ILLINOIS, }

Plaintiff-Appellee }

v. }

LAVON LOGAN, }

Defendant-Appellant }

Appeal from
Circuit Court
Adams County
72-CF-23

Mr. JUSTICE SMITH delivered the opinion of the court:

The defendant appeals from a sentence of 15 to 30 years imposed by the circuit court of Adams County on a jury verdict of guilty of armed robbery. The defendant contends: (1) that the State failed to prove the defendant guilty beyond a reasonable doubt; (2) that the defendant was deprived of a fair trial because of a question relating to other crimes; (3) that a new trial should be granted because of newly discovered evidence that a State witness gave perjured testimony and had an undisclosed motive in so testifying; and (4) that the sentence is excessive.

Lynn Karmer, cashier of a theater in Quincy, testified that while on duty about 9:30 P.M. a man approached her, laid what appeared to be a real gun on the counter and said, "Give

it to me". After giving him some money, the man said, "Give me the rest, or do you want me to shoot you." She gave him the rest of the cash. He then left and proceeded north on Eighth Street. She was unable to identify the armed robber either before or during the trial and described him as having dark brown hair and wearing a black tee shirt. There were no other eyewitnesses to the incident. Another witness testified that he saw the defendant running north on the west side of Seventh Street that evening, that he was seated in a chair in front of his house when he saw a man come out of an alley and run north on the opposite side of the street. He recognized the defendant whom he had known for some 13 or 14 years before and identified the defendant in court. He observed the defendant about one minute, stated it was late in the evening and dark, and that the defendant was wearing a lightweight, glossy type jacket. The defendant's right hand had a gun in it. The defendant disappeared near an old church building on Seventh Street. Ronald Holt, another witness, lived at 331 South Seventh Street immediately north of an old church building. He testified that the defendant came to his house on the evening in question, but he wasn't sure of the time. None of his family who were at home were present when Holt, according to his testimony, had a conversation with Logan. Logan said he had hit a place and had to get rid of a gun and wanted to know if he could hide it. Holt refused this request and said the defendant had a gun sticking in his pants and some money in his hand. In his statement to the police, he stated that

returned to show
evidence - 12/9/74

it to me". After giving him some money, the man said, "Give me the rest, or do you want me to shoot you." She gave him the rest of the cash. He then left and proceeded north on Eighth Street. She was unable to identify the armed robber either before or during the trial and described him as having dark brown hair and wearing a black tee shirt. There were no other eyewitnesses to the incident. Another witness testified that he saw the defendant running north on the west side of Seventh Street that evening, that he was seated in a chair in front of his house when he saw a man come out of an alley and run north on the opposite side of the street. He recognized the defendant whom he ^{had} known for some 13 or 14 years before and identified the defendant in court. He observed the defendant about one minute, stated it was late in the evening and dark, and that the defendant was wearing a lightweight, glossy type jacket. The defendant's right hand had a gun in it. The defendant disappeared near an old church building on Seventh Street. Ronald Holt, another witness, lived at 331 South Seventh Street immediately north of an old church building. He testified that the defendant came to his house on the evening in question, but he wasn't sure of the time. None of his family who were at home were present when Holt, according to his testimony, had a conversation with Logan. Logan said he had hit a place and had to get rid of a gun and wanted to know if he could hide it. Holt refused this request and said the defendant had a gun sticking in his pants and some money in his hand. In his statement to the police, he stated that

the defendant "pulled out some bills, out of a coat pocket, then put them back in the coat pocket, about this time Terry (a brother of defendant) came in. I told them to go out the back door, because I didn't want anyone to see them coming out of my house. And then they both left." Holt did not remember what the defendant was wearing or the color of his clothing.

Defendant's Exhibit No. 1 was Holt's statement to the police and it was used by defense counsel in attempting to impeach Holt. Holt's statement was offered in evidence as defendant's Exhibit No. 1 and the State's attorney asked that it be read to the jury stating to the court, "it's my understanding that this is being done without objection from the defense". Defense counsel stated, "That's correct, Your Honor". The clerk of the court then read the following question by the police and answer by Holt.

Q. Did you have any information pertaining to any other armed robberies they had committed? We have information they [Lavon "Sonny" Logan and Terry Logan] had pulled seven armed robberies during this period.

A. No.

The court then directed the jury to disregard any reference at all to any alleged offenses other than the one for which the defendant is standing trial here. The court then stated that Exhibit No. 1 would not go to the jury because the exhibit "had references to alleged other offenses". Holt was then recalled and testified that in 1964 and 1970, he had been convicted of burglary and was presently on probation. A

police officer testified that he was the only detective on duty in the Quincy Police Department on the evening of the robbery, that he investigated a report of the armed robbery of the State Theater and that it was the only such offense reported to the Detective Section on that date. He further testified that there could have been other reports of other crimes involving a weapon on the date in question, and that he knew the defendant to be about six feet to six feet one inch tall - testimony contradicting other descriptions fixing the defendant's height at five feet seven inches. The defendant offered no testimony. The court denied defendant's motion for directed verdict. The jury was polled and returned a verdict of guilty.

It is at once noted that the evidence here is circumstantial and a guilty verdict must depend upon reasonable inferences from the circumstances. The credibility of the witnesses, their appearance, candor or lack of candor, and whether or not these circumstances convince the jury beyond a reasonable doubt is for the trier of fact and not for us. There was a sufficient chain of evidence, if believed, that would warrant a finding of guilty.

The statement of other crimes referred to in the defendant's Exhibit No. 1 was read to the jury without objection by the defense. The court then did what it could to avoid any possible prejudice, refusing to let the document go to the jury and by

specifically directing them to disregard any statement concerning alleged crimes other than the one on trial.

The defendant's motion for an acquittal or a new trial was argued and denied. Thereafter defendant filed a pro se motion to amend and supplement the previous post-trial motion on the basis of newly discovered evidence that Ronald Holt had perjured himself and had a motive for so doing. Evidence of several witnesses suggests that Holt came by the jail and yelled to the jail window from his car. The jailer testified that this occurrence did take place, that it was not infrequent, and he couldn't specifically say it was just Logan. Logan testified that Holt stated he had been to Logan's attorney's office, that Logan should appeal his case, and that he would testify that he had been pressured into lying at the trial. Holt did not identify anyone alleged to be pressuring him. Holt was on probation, was not available for subpoena and had told someone that he felt he would be better off on his request to go to California if he did testify. The attorney for the defendant stated that Holt came to his office concerning his probation, but he had no knowledge of any other attempts by Holt to contact his office. Holt's cousin (in jail at the time) testified to the Holt-Logan conversation and stated that Holt said he would testify that he had lied at the trial. Holt's cousin likewise stated that Holt had visited him in jail, told him he testified against Logan under pressure of having his probation revoked and that he, Holt, thought he

would be able to go to California without appearing at the trial if he made the statements. This witness testified that he suspected that Holt was in California at the time of the hearing on this motion, as he was not available for testimony. A witness Wernowsky who had known Holt for about 10 years testified that Holt told him prior to the trial that he was worried about his probation, was being pressured into testifying as a State witness in the defendant's trial. Wernowsky had a second conversation with Holt approximately two weeks before the hearing on the newly discovered evidence. He testified that Holt was angry because he'd been denied permission to move to California and was going to make a written statement about his being pressured. This witness did not know whether Holt had been told he could go to California if he testified, did not indicate who had been pressuring Holt, nor did he tell Wernowsky that he had lied on the witness stand.

After hearing on the motion for new trial, the trial court denied it. It is at once apparent that the testimony of these various witnesses rests in their credibility. All of them were in jail on one offense or another. The record raises the question of whether the evidence was discovered after testimony and seriously raises the question as to whether Holt either was pressured into testifying as he did ✓ on the trial or that he committed perjury on the trial. It is clear that he lied on the trial or to the others later. The trial judge had the opportunity to view and hear the witnesses. With the records of all of them, it's not surprising

that their testimony conflicts in many points. We have read and reviewed this record with care and have concluded that although the evidence of the armed robbery is largely circumstantial, the circumstances of the robbery, of the gun, of the fact that Logan came down the alley from Eighth Street to Seventh Street and disappeared near the church where Holt resided on Seventh Street, of the fact that he wanted to hide his gun with Holt, if believed by the jury, together with the defendant's possession of money and his statement to Holt that he had just hit a place, suggest that this is a chain of events which the jury believed and if believed, it establishes the guilt of the defendant beyond a reasonable doubt.

It would therefore appear that this so-called newly discovered evidence was not of such a conclusive character that it would probably change the result if a new trial was granted, nor does it appear that it was discovered after the trial, nor does it appear that it might not have been discovered if true before the trial and lastly it goes only to the credibility of a witness rather than to the question of the innocence or guilt of this defendant. (People v. Silvia, 389 Ill.346, 59 N.E.2d 821.) Defendant cites People v. Bolton, 10 Ill.App.3d 902, 295 N.E.2d 11, where the defendant was granted a new trial when a State witness testified falsely that he had not been promised favorable treatment for his testimony and the record showed otherwise. Cited also is People v. Sims, 4 Ill.App.3d 878, 282 N.E.2d 16, which is

properly asserted for the proposition that the fundamental concepts of justice make the use of perjured testimony abhorrent and will warrant a new trial. In that case, however, the decision was based on pleadings supported by the affidavit of the one who testified falsely. Not so here. Holt was not available and the suggestion that he testified falsely is pure hearsay and not an admission or a statement on his part that he did so. There had been a full hearing here on that issue before the court and the issue determined against the defendant.

The defendant likewise asserts that this sentence is excessive and should be reduced by this court. That we have the authority to do so in proper cases is unquestioned since the decision in People v. Taylor, 33 Ill.2d 417, 211 N.E.2d 673. It is asserted that "neither the nature and circumstance of the offense" nor the "history and character of the defendant" support a minimum sentence as high as 15 years. This record somewhat undermines such an assertion. The defendant was 27 years old at the time of his sentencing and had an extensive prior criminal record: A 1965 conviction and fine for a faulty muffler; a 1966 conviction and fine for fleeing to avoid arrest; a 1966 conviction for burglary for which the defendant was first granted 3 years' probation, then given a one to four year sentence after his probation was revoked for his 1967 conviction and one year sentence for deceptive practices; a 1969 conviction and 30 day sentence for assault, battery, and disorderly conduct; a 1970 conviction and fine for disturbing the peace; a 1971 conviction and 68 day

sentence and \$150 fine for theft of property under \$150; a 1972 conviction and fine for interfering with an officer; a 1972 charge of carrying a concealed weapon on which the defendant forfeited his bond; a 1972 conviction and two to four year sentence for intimidation; and the present offense. Under such circumstances, a suggestion that the minimum sentence in this case should be reduced to provide a greater incentive for rehabilitation is somewhat less than convincing, and provides some apprehension that a reduction of sentence in this case by this court would fail of its desired and asserted mark by a wide margin.

We regret the necessity for again reminding the profession that our system of trial and review is predicated on an adversary system. This contemplates that both sides in apt time prepare and present their points of view, both in the trial court and in the reviewing court. Any other course is unfair to the trial judge who renders the judgment and unfair to the court that is required to review it. Courts have in the past reversed pro forma or reversed and remanded as the circumstances may have justly warranted. (Morella v. Melrose Park Cab Co., 65 Ill.App.2d 175, 212 N.E.2d 106; People v. Spinelli, 83 Ill.App.2d 391, 227 N.E.2d 779; People v. Lio, 108 Ill.App.2d 443, 247 N.E.2d 912; People v. Hardwick, Fourth District, General No. 12539.) In each instance, the court properly declined the role of advocate and either reversed or reversed and remanded. In the exercise of our discretion and because the circumstances here warrant it, we have reviewed this case on its merits and considered the assignments

of error urged by the defendant in determining the issues on the record thus presented to us. That in so doing we expended unnecessary time and effort in the performance of a role we have labeled as abhorrent would seem obvious.

There being no error in the trial of this case, the judgment of the trial court is affirmed.

Affirmed.

CRAVEN, J. and TRAPP, P.J. concur.

73-330

PEOPLE VS. ROBERT W. WHITNEY

STATE OF ILLINOIS



APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,
on the 1st Day of January in the Year of our Lord one thousand
nine hundred and seventy-five within and for the Third District
of Illinois:

Present—

HON. ALLAN L. STODER, Presiding Justice

HON. JAY J. ALLOY, Justice*

HON. RICHARD STENGEL, Justice

HON. TOBIAS BARRY, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on
December 23, 1974 the Opinion of the
Court was filed in the Clerk's Office of said Court, in the words
and figures following, viz:

In The
APPELLATE COURT OF ILLINOIS

Third District

A. D. 1974.

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
vs.	)	McDonough County
ROBERT W. WHITNEY,)	
Defendant-Appellant.	)	Honorable
	)	G. Durbin Ranney,
	)	Presiding Judge.

Mr. JUSTICE ALLOY delivered the opinion of the court: **Abstract**

This is an appeal from a judgment of the Circuit Court of McDonough County finding defendant Robert W. Whitney guilty of violating Section 704(a), Chapter 56½, Illinois Revised Statutes, 1973, with the possession of less than 2.5 grams of cannabis. The judgment was based upon a guilty plea in the Circuit Court of McDonough County and defendant was sentenced to a term of 30 days in the County Jail. The charge is not punishable by imprisonment in the penitentiary.

A number of issues were raised on appeal in this Court but we are primarily concerned with the action of the trial court in failing to appoint counsel for defendant in this action. When defendant first appeared in court, after his rights were explained to him, and he was advised he was entitled to counsel, he requested that counsel be appointed for him, and at the direction of the authorities filed an asset and liability affidavit. The affidavit revealed that the defendant Robert W. Whitney was married and was an unemployed student with no demonstrable source of income. His total assets were shown as valued at \$800, the bulk of which was represented by an old automobile and certain personal effects. Apparently, \$200 to \$300 was in cash. The affidavit further showed that defendant borrowed \$100 which was required for bail so that his net cash was approximately \$200. Following brief hearing, the trial judge refused to appoint counsel, and there-

after defendant pleaded guilty, but was allowed to withdraw the plea when he denied any culpability. Later the same day, he again pleaded guilty and the plea was accepted.

Five weeks later, defendant again appeared at the sentencing without counsel. The sentencing judge made no effort to determine whether defendant desired counsel and defendant said nothing to the judge on that issue. Following the hearing, defendant was sentenced to a term of 30 days in the County Jail. This Court has appointed counsel to represent defendant on appeal in this case on the basis of an affidavit filed with this Court.

An indigent defendant is entitled to court-appointed counsel in misdemeanor cases (People v. Morrissey, 52 Ill. 2d 418, 288 N.E.2d 77). He is also entitled to counsel at a sentencing hearing where sentence of imprisonment is to be imposed. (Argersinger v. Hamlin, 409 U.S. 25, 32 L.Ed. 2d 530, 92 S.Ct. 2006; Ill. Rev. Stat. 1973, ch. 38 sec. 113-3(b)). As stated in People v. Cole, 97 Ill. App. 2d 239 N.E.2d 455, the determination of whether or not a party is entitled to appointed counsel is a matter within the discretion of the trial judge, but that discretion is a "delicate matter and must be delicately decided, always with a mind toward protection of the defendant from any possible impairment."

In the cases annotated at 51 ALR 3d 1108, it is pointed out that the nature of the term "indigency", no specific rules or standards of indigency can be formulated in all cases. The determination should be made by the trial court on the basis of as complete a financial picture as is feasible and the court should give consideration to the fact that the defendant need not be "totally devoid of means" to be indigent, it being sufficient if he lacks the financial resources on an objective basis to retain a competent attorney to represent him. As stated by the court in U.S. v. Cohen, 419 Fed. 2d 1124, a defendant need not be destitute to have counsel appointed for him as an indigent. It is also clear that even if an individual is able to obtain funds to post bond on appeal, that still does not disqualify him from being an

indigent as shown in People v. Eggers, 27 Ill. 2d 85, 188 N.E.2d 30, where defendant spent \$350 to obtain a bond. In close cases such as we have before us, we believe that the court should favor appointment of counsel for a defendant who contends he is indigent to assure protection of a defendant who may be unable to afford counsel even though he is not wholly without assets. Here the defendant possessed a minimal amount of assets without any demonstrable source of income. If he were to retain an attorney it might consume all of his assets. We have always considered that the failure to appoint counsel for an indigent in proper cases is a very serious deprivation. (People v. Gustavson, 131 Ill. App. 2d 887, 269 N.E.2d 517).

It is obvious that trial counsel would have been of great value to defendant at the trial stage and at the sentencing stage. In view of the record before us, we believe that the trial court in this cause did not properly exercise its discretion and that the failure to appoint counsel for defendant constituted reversible error.

There were other issues raised in this cause which we need not discuss in view of our disposition of this appeal. This cause is, therefore, reversed and remanded to the trial court with directions to vacate the judgment in this cause and to appoint counsel for defendant, if his financial situation has not improved since his appeal was initiated in this Court. Defendant shall likewise be permitted to withdraw his plea of guilty if he so desires and this cause may thereafter proceed in such court in accordance with the views expressed in this opinion.

Reversed and Remanded with Directions.

Stouder, P. J. and Stengel, J. concur.

60550

PEOPLE OF THE STATE OF ILLINOIS,)
)
Respondent-Appellee,)
)
vs.)
)
EARL JOHNSON,)
)
Petitioner-Appellant.)

APPEAL FROM THE
CIRCUIT COURT
OF COOK COUNTY.

HONORABLE
NORMAN C. BARRY,
PRESIDING.

PER CURIAM:

Before Hayes, P.J., Stamos and Downing, JJ.

Earl Johnson, petitioner, appeals the denial of his amended post-conviction petition after an evidentiary hearing.

Petitioner was originally charged by Indictment 55-2742 with the crime of murder. A jury trial began on February 14, 1956, before Judge Norman C. Barry. On the second day of trial, at petitioner's request, a mistrial was declared and petitioner withdrew his plea of not guilty and entered a plea of guilty. He was sentenced to a term of 99 years.

On July 12, 1960, petitioner filed a pro se post-conviction petition in which he alleged (1) that his confession had been coerced by police brutality and by representations by both the police and members of the State's Attorney's office that unless he confessed he would incur the death penalty; (2) that his plea of guilty had been involuntary in that a) his court-appointed counsel made representations which led him to believe that if he persisted in his plea of not guilty he would receive the death penalty, whereas if he would enter a plea of guilty he would receive a much lesser sentence; and b) he did not understand that on a plea of guilty he could be sentenced to life or any number of years or to death; and (3) that his court-appointed counsel had been incompetent in that he had made no effort to use two available alibi witnesses.

The petition was supported by an affidavit of petitioner's

trial counsel stating that in his opinion, based upon numerous conferences with petitioner, the latter did not realize the full significance of his plea of guilty at the time it was entered. On November 28, 1961, upon motion of the State, the trial court dismissed petitioner's pro se post-conviction petition without an evidentiary hearing.

Petitioner appealed to the Illinois Supreme Court who, by memorandum order dated February 19, 1963, reversed and remanded for an evidentiary hearing on the post-conviction petition. The Supreme Court order was filed in the criminal division of the circuit court of Cook County on February 27, 1963, and the case was subsequently assigned to the original trial judge, Norman C. Barry.

On April 6, 1964, petitioner was represented by privately retained counsel who was engaged in a jury trial in another court and did not appear. That date had been set as a final date by the trial court. Petitioner's retained counsel requested a continuance at that time. The trial judge denied the continuance and dismissed the petition with the suggestion that counsel could prepare a new petition to be filed. There was no appeal from that dismissal.

In 1971 petitioner filed a second post-conviction petition. On October 14, 1971, upon motion of the State, the trial court dismissed the petition without an evidentiary hearing. Petitioner appealed and on May 1, 1973, this court reversed and remanded with instructions that the trial court conduct an evidentiary hearing as ordered by the Supreme Court. People v. Johnson, 11 Ill. App. 3d 510, 298 N.E. 2d 346.

The case was assigned to Judge Norman C. Barry. On December 7, 1973, petitioner's appointed counsel filed an amended post-conviction petition, which alleged that the petitioner's

plea of guilty was involuntary based upon the fact (1) that at the time of his conviction petitioner was 19 years of age and had a subnormal mental capacity; (2) that petitioner had been severely beaten and threatened with the death penalty and promised leniency by members of the Chicago Police Department; and (3) that on February 15, 1956, petitioner's court-appointed counsel participated in a conference with the prosecutor and the trial judge, Norman C. Barry, and that upon returning to the lockup counsel advised petitioner that if he persisted in his plea of not guilty he would receive the death penalty, but that if he pleaded guilty he would be out of prison in five years. Petitioner also alleged that his court-appointed counsel was incompetent in that he made no effort to interpose the defense of two alibi witnesses. On February 15, 1974, after an evidentiary hearing before Judge Norman C. Barry, petitioner's post-conviction petition was denied. Petitioner now appeals that denial.

Petitioner's first contention on appeal is that the trial court erred in denying his request for a substitution of judges at the evidentiary hearing on his amended post-conviction petition. The law is well established that in post-conviction proceedings the trial judge should excuse himself when it appears that he may be biased or may be a potential witness. People v. Wilson, 37 Ill. 2d 617, 230 N.E. 2d 194; People v. Washington, 38 Ill. 2d 446, 232 N.E. 2d 738.

In the case at bar, prior to the evidentiary hearing on petitioner's post-conviction petition, petitioner's counsel asked the trial judge for a substitution of judges based upon the allegation in his amended post-conviction petition that defense counsel, after a conference with the trial judge and the prosecutor, informed petitioner that if he entered a plea of

guilty he would be out of prison within five years. Counsel stated that, based upon this allegation, he wished to call the trial judge as a witness. The trial judge denied the motion of petitioner's counsel. Subsequently the trial judge, on a second occasion, again denied the motion. We note that this allegation of the amended post-conviction petition was merely an expansion of similar statements made in the original and in the second post-conviction petitions. It is evident from an examination of the allegations in the amended post-conviction petition that the trial judge allegedly was in a position to be a material witness to facts which occurred at the pre-trial conference. Under these circumstances, the petitioner was entitled to call the trial judge as a witness. Since the trial judge might be a material witness in the case, he should have excused himself and the hearing should have been held before a different judge.

The State's only argument in this regard is that the trial judge, in denying petitioner's motion, stated that he did not remember what had occurred at the time petitioner entered his plea of guilty eighteen years previously and therefore had no reason to excuse himself since he had no testimony to give. While at the time he had no memory of what had occurred at the pre-trial conference at which he had allegedly been present with the prosecutor and the defense counsel, still the potential existed that his memory might be refreshed in some manner. In fact, from several comments which he made as the hearing on the motion progressed, there is some indication that he began to remember some of the facts which had occurred. In view of this potential, therefore, the mere fact that the trial judge at the time of the motion had no memory of the facts which he was allegedly in a position to know was not an adequate basis on which to deny the motion for a substitution of judges, which denial prejudiced the

petitioner in that it eliminated the potential. Under these circumstances, the trial judge's failure to excuse himself requires that this case be reversed and remanded for a new evidentiary hearing.

Petitioner also contends that his plea of guilty must be vacated because the inordinate delay occasioned by the State has denied him effective due process of law. We note that although petitioner was convicted in 1956 he did not file his first post-conviction petition until 1960. As this court pointed out in its opinion on the petitioner's second appeal, while that petition was pending there were a long series of delays, many of which were at petitioner's request. (People v. Johnson, 11 Ill. App. 3d 510, 512, 298 N.E. 2d 346.) On April 6, 1964, petitioner's initial post-conviction petition was dismissed because petitioner's privately retained counsel failed to appear on a date which was set to be a final continuance by the trial judge. Petitioner did not appeal the dismissal of his petition but waited seven years until 1971 to file a new post-conviction petition. That petition was dismissed without an evidentiary hearing and petitioner appealed. Even after this court reversed and remanded on May 1, 1973, with instructions to hold a hearing, petitioner waited until December 7, 1973, to file his amended post-conviction petition. After a careful review of all of the proceedings which have occurred in this case, we conclude that much of the delay was occasioned by the petitioner. He was in no way denied due process of law.

While petitioner argues several other points, our determination that the cause must be reversed and remanded for a new hearing makes it unnecessary for us to rule upon these issues.

For the foregoing reasons, the judgment of the circuit court of Cook County denying petitioner's amended post-conviction

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petition is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Publish abstract only.

12-10-17

Mid Air

Before.



59846)
59847)

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
	)	HONORABLE
CHARLES MILLER and DALE E. NELSON,	)	JAMES MAHER, JR.,
Defendants-Appellants.	)	JUDGE PRESIDING.

Before Stamos, Leighton, and Downing, JJ.

PER CURIAM:

The defendants, Charles Miller and Dale E. Nelson, were charged in identical complaints with committing a battery on Nicholas V. Bukovitch on July 28, 1972. (Ill. Rev. Stat. 1971, ch. 38, par. 12-3.) Both defendants were convicted following a bench trial on January 15, 1973 and sentenced to seven days in the House of Correction, but a new trial was granted at which both defendants were again convicted following a bench trial and sentenced to ten days. The defendants contend on appeal: (1) they did not knowingly and understandingly waive their right to trial by jury; (2) they were not proven guilty beyond a reasonable doubt; (3) the greater sentence (ten days) following the second trial violates due process and should be reduced to the term imposed after the first trial (seven days) and even the seven-day sentence is excessive.

When the case was called for trial on September 24, 1973, the following colloquy occurred:

"MR. DRURY: We are ready; I will appear for Charles Miller, as well as Dale Nelson. Larry Drury, D-R-U-R-Y.

THE COURT: And the plea is?

MR. DRURY: Plea is not guilty for both defendants.

THE COURT: Jury?

MR. DRURY: Jury is waived."

These charges grow out of a motor vehicle accident in which a car driven by the defendant Nelson, and in which the

defendant Miller was a passenger, hit another vehicle.

Nicholas Bukovitch testified that on July 28, 1972, he was in the vicinity of Cumberland and Coral Drive in Norridge and observed an accident happen. He pulled a horse trailer he was hauling over to the side about a quarter of a block up the street, walked back and told the driver of the vehicle he was a witness to the accident. At this time the defendant, Charles Miller, came over to him and told him he should get the hell out of there before Miller killed him. As he walked down the street, Miller and a second person, Patrick Carr (not a defendant at this trial), followed him to his car and started "punching and kicking" him. Miller punched him in the stomach and face and kicked him in the stomach and leg. Miller and Carr left and defendant Dale Nelson came over and told him to get the hell out of there. As he got into the driver's side of his car, Nelson started punching and kicking him through the door as he was getting in and was reaching through the window punching him. He drove the car over by the bowling alley and when the police came "they" ran off. He did not go to the hospital, but he went to the dentist the next day and lost teeth. On cross-examination, he testified that he was talking to the husband of the woman who was driving and defendant Nelson was talking to the driver of the car. Another car with three people in it pulled up, and he called one of the "guys" in that car over, and after Miller had told him to leave, he also told him to get out of there before there was trouble and they did. A Mr. Pecos also pulled up. He did not say anything to Miller or make any gestures or indicate he was going to attack him. He denied that he closed the door on Nelson or that he attempted to strike back at Nelson from his window, saying that he was trying to roll it up.

Perry Pecos testified that he witnessed the incident described by Bukovitch. He saw Nelson striking Bukovitch

and he saw Miller striking Bukovitch. Bukovitch just stood there and ran to his car, at which point Nelson was "poking at him" from the driver's side window which was open. On cross-examination, he testified he observed that "they" were striking Bukovitch, that Bukovitch was running to his car and "they" were chasing him. He heard Bukovitch yelling for help and telling them to get away and leave him alone, saw Bukovitch trying to roll up the windows and close his doors, and "they" were trying to open them and jumping on top of the car banging on it. He denied that he told Nelson at any time that a thousand dollars would take care of the case.

Chris Tartaglia testified that she pulled over because of an accident and saw Bukovitch, whom she knows, getting kicked and punched in the face by the defendants. Bukovitch was trying to get away, waving his hands trying to defend himself, but he wasn't swinging, just protecting his face. She said she "saw everything" from where she was sitting in the van in the parking lot. When she was asked to explain earlier testimony at the first trial that at a particular time she saw only a Mr. Carr strike Bukovitch, she said she remembered being asked a question like that several times, but that she did not remember saying that she did not see anybody except Carr. At this point an exhibit was marked as a certified copy of a transcript of the prior proceeding, but it was not received or offered in evidence.

Dale Nelson testified that after the accident, he left his car and the first time he saw Bukovitch was when everybody was fighting. Bukovitch and a bunch of riders or jockies were having a fight with friends of his, Charles Miller and Pat Carr, and he went out to help his friends out because there were six people fighting against two. He had no conversation with Bukovitch and didn't ask him to leave. Bukovitch shut the door of his car on his hand, started the engine and was striking back out of the window. He had a

battery charge against Bukovitch and once had a conversation with Pecos who told him a thousand dollars would take care of it all, for the lawyers' bills and everything. On cross-examination, he testified he did strike Bukovitch after the door was shut on his hand, that his hand did not require medical attention, but he got a cut on his finger. Bukovitch also struck him with his hand. He did not see Miller strike Bukovitch.

Charles Miller testified that after the accident, he stepped out of his car and wanted to tell everybody they could go because Dale Nelson was "going to take care of it." After he told Bukovitch he could leave, Bukovitch waved at another van and two guys got out of the car, and three or four got out of a truck and circled around him and another friend. Some words were passed and his friend jumped at one of the guys. He, Miller, jumped out in front of his friend and said to them, "If you want to fight you are going to have to fight me before you get to him." He had no physical contact with Bukovitch; he did see Dale Nelson go over to the car and jump in the air for some reason; he guessed Dale had his hand caught in the door. On cross-examination, he testified that he did tell Bukovitch to get the hell out of the way, and again told Bukovitch to go and he did not. He denied that he struck anybody and added that Nelson's finger was bleeding.

The defendants' first contention, that they did not waive the right to a jury trial, is controlled by People v. Sailor (1969), 43 Ill. 2d 256, 253 N.E.2d 397, where privately retained counsel stated in the presence of his client, that a jury is waived. The court said that since an accused ordinarily acts through his attorney, a trial judge, relying on the professional responsibility of the attorney, may properly assume from a lawyer's representation that his client has waived the jury, and that the client has knowingly and

understandingly consented to his lawyer's action. The Sailor case and the many decisions of the Illinois Appellate Courts since Sailor has been exhaustively discussed in the recent case of People v. Durham (First District, Fifth Division: October 11, 1974, ___ Ill.App.3d ___, ___ N.E.2d ___, General Number 58824), and we need not discuss them here. Leave to appeal has been granted by the Illinois Supreme Court in the case of People v. Brodus (1st Dist. 1974), 19 Ill. App. 3d 840, 313 N.E.2d 511. Both cases are readily distinguishable from the facts here.

The defendants also contend that the rule in Sailor was implicitly modified by the subsequent adoption of Supreme Court Rule 402 pertaining to guilty pleas. (Ill. Rev. Stat. 1971, ch. 110A, par. 402.) This contention, however, is without merit. By its own terms, Rule 402 applies only to guilty pleas and it has been held that Rule 402 does not apply to a bench trial. See People v. Stepheny (1974), 56 Ill. 2d 237, 240, 306 N.E.2d 872.

The defendants next contend that they were not proved guilty beyond a reasonable doubt. The State points out, however, that Bukovitch was positive in his testimony, and that he was not impeached in any way on cross-examination. In addition, his testimony was corroborated by the testimony of Pecos and Tartaglia. Miller admitted telling Bukovitch to go although he denied he struck anybody. Nelson's story was that he did not get involved until everybody was fighting and that Bukovitch shut the car door on his hand. Nelson did not satisfactorily explain, however, what he was doing with his hand in a position where Bukovitch could shut the door on it. Nelson does admit striking Bukovitch after the door was shut on his hand.

However, defendants argue that both Pecos and Tartaglia were impeached by their testimony at the former trial. We note first that the transcript of the first trial

is not contained in the record on this appeal. Although it was marked as an exhibit, it does not appear that it was offered or admitted in evidence at the second trial. At the second trial, defendants' counsel attempted to impeach Tartaglia on the ground that at the former trial she had allegedly testified that Carr was the only one she saw strike Bukovitch. At the second trial, however, although she recalled being asked questions along that line, she positively denied that she so testified. Absent a properly certified copy of the trial transcript in this record, Tartaglia's testimony at the second trial must control. (See Supreme Court Rule 323 (Ill. Rev. Stat. 1971, ch. 110A, par. 323).) This witness was, therefore, not properly impeached.

Defendants also claim that Pecos's testimony was impeached by what he said at the first trial. The first attempt to impeach Pecos was by reading questions and answers allegedly from the first trial when Pecos allegedly said he had not seen Bukovitch struck while he was standing outside near the scene of the accident, and testimony that the only thing he had seen was at the Coral Lanes. At the second trial, he explained this statement by saying he (Pecos) was standing at the Coral Lanes when he saw Bukovitch struck and did not see him struck "by the accident." A second attempt at impeachment concerned whether Pecos saw the impact, but review of the record on this point indicates no material contradiction between the testimony at the second trial and the alleged testimony at the first trial. Finally, the defendants attempted to impeach Pecos on the ground that at the first trial he saw "the defendants" chasing Bukovitch. This would also have conflicted with Bukovitch's testimony since Bukovitch testified the defendant Nelson did not join in until he, Bukovitch, got to his car. The actual question put to Pecos was, "And you saw the defendants chasing after the plaintiff?", to which Pecos responded, "Yes, I did."

This apparent discrepancy may be explained because Pecos was referring to Miller and Carr. Although Carr was not a defendant in this case, he apparently was in an earlier case.

In short, the evidence shows that the defendants were positively identified by the complaining witness and by two disinterested third parties, who had ample opportunity to observe the events in question and whose testimony was not materially impeached. This conflicting testimony presented a question of credibility which was properly resolved by the trier of fact. The evidence is not so unsatisfactory as to leave a reasonable doubt of the defendants' guilt. People v. Novotny (1968), 41 Ill. 2d 401, 411-412, 244 N.E.2d 182.

Under North Carolina v. Pearce (1969), 395 U.S. 711, and People v. Baze (1969), 43 Ill. 2d 298, 302-303, 253 N.E. 2d 392, the second conviction must be reduced so that it does not exceed the first sentence of seven days.

Defendants further argue in mitigation that both were Viet Nam veterans who had seen active combat duty, were working and supporting a family, and had no difficulty with the law from the time of the occurrence on July 28, 1972 until the date of the sentence at the second trial on September 24, 1973. Defendants ask here that the court reduce the sentence to a term of probation. However, a reviewing court may not impose probation when the trial court has imposed imprisonment. (People ex rel. Ward v. Moran (1973), 54 Ill. 2d 552, 556-557, 301 N.E.2d 300.) Alternatively, the defendants now ask to be placed on a work release program, but no request for this alternative was presented in the trial court. We do not consider a sentence of seven days to be excessive under these circumstances. Accordingly, the sentences for each defendant are each reduced to seven days, and, as modified, the judgments of the circuit court of Cook County are affirmed.

Judgments affirmed as modified.

(Publish abstract only.)



60003

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
v.	)	OF COOK COUNTY.
)	
RICARDO NORALS,	)	HONORABLE
	)	JOHN J. CROWLEY,
	)	PRESIDING.
Defendant-Appellant.)	

PER CURIAM (First Division, First District).

Before EGAN, P.J., BURKE and GOLDBERG, JJ.

Ricardo Norals, defendant, was charged with unlawful use of weapons in violation of Section 24-1(a)(10) of the Criminal Code (Ill.Rev.Stat. 1973, ch. 38, sec. 24-1(a)(10)). After a bench trial defendant was found guilty and sentenced to six months in the House of Correction.

On appeal, defendant does not dispute the commission of the act charged but challenges only the validity of the statute under which he was convicted. He contends Section 24-1(a)(10) is unconstitutional in that (1) it violates Article IV, Section 13, of the Illinois Constitution because it applies only to incorporated cities, villages and towns; and (2) having this limited application, it also violates the Equal Protection Clause of the United States Constitution.

In the recent case of People v. Graves, Appellate Court, No. 59961, October 11, 1974, the court held that Section 24-1(a)(10) is constitutional and not in violation of Section 13 of Article IV of the Illinois Constitution or the Equal Protection Clause of the United States Constitution.

In the case at bar, defendant refers to the book, "Number of Inhabitants: U.S. Summary, United States Dept. of Commerce, 1970", which indicates there are certain unincorporated towns in Illinois which have a population greater than some of the incorporated communities. He states that since Section 24-1(a)(10) does not protect certain densely populated unincorporated areas in the State,

while it includes sparsely populated incorporated areas, the statute violates the State and Federal Constitutions.

On the other hand, the State refers to a collection of statistics entitled "Crime in Illinois, 1972" which indicates that the crime rate for several major crimes, as defined by the Illinois Department of Law Enforcement, is more than twice as large for incorporated areas than for unincorporated areas; and that "crimes against persons" is almost five times larger in incorporated areas than in unincorporated areas.

In light of the foregoing, it is apparent there was a reasonable basis for the legislature's differentiation between those persons who carry or possess "any loaded pistol, revolver or other firearm" within "the corporate limits of a city, village or incorporated town" from those persons who carry or possess "any loaded pistol, revolver or other firearm" in an unincorporated area. Generally, crime is greater in the city, village and incorporated town than in an unincorporated area. Because in the State of Illinois there are certain unincorporated areas with populations greater than certain incorporated areas does not necessarily result in an unreasonable classification, as long as the statute operates uniformly throughout the State and on all persons in like circumstances and conditions. Youhas v. Ice, 56 Ill.2d 497, 309 N.E.2d 6.

Section 24-1(a)(10) does not violate Section 13 of Article IV of the Illinois Constitution or the Equal Protection Clause in the United States Constitution. The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

ABSTRACT ONLY.



59213
59214 - consolidated

HARVEY WALKER, JULIETTE WALKER,
RICHARD HUDSON, SONJA HUDSON,
and LELA McLAIN,

Plaintiffs-Appellants,

v.

JOHN C. MARCIN, CITY CLERK OF
THE CITY OF CHICAGO, and THE
BOARD OF ELECTION COMMISSION-
ERS OF THE CITY OF CHICAGO,

Defendants-Appellees.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

CURTIS A. SHANK, CHRISTINE
BROWN, CRAWFORD G. BROWN,
EDDIE PARKER and LOIS PARKER,

Plaintiffs-Appellants,

v.

JOHN C. MARCIN, CITY CLERK OF
THE CITY OF CHICAGO, and THE
BOARD OF ELECTION COMMISSION-
ERS OF THE CITY OF CHICAGO,

Defendants-Appellees.

HONORABLE
HARRY G. COMERFORD,
Presiding.

Before McNAMARA, P.J., DEMPSEY and MEJDA, JJ.

PER CURIAM.

Plaintiffs appeal from the judgments of the trial court which dismissed with prejudice their complaints separately contesting the validity of local option elections in the 33rd Precinct of the 8th Ward and in the 66th Precinct of the 18th Ward, located in the City of Chicago. Both appeals have been consolidated in this court.

The issues on appeal are whether Article IX, Local Referendum, of the Liquor Control Act (Ill. Rev. Stat. 1971, ch. 43, pars. 166 et seq.) is unconstitutional because it fails to provide for notice to the resident voters and retail licensees of the respective precincts of the circulating and filing of the local option petitions; and whether the complaints were defective because they were not filed within 30 days immediately prior to the date of the local option election.

The Walker case pertains to the local option election in the 33rd Precinct of the 8th Ward. The Shank case pertains to the local option election in the 66th Precinct of the 18th Ward. In each instance the complaints sought to enjoin the filing with the Secretary of State of Illinois the report of the local option election held on November 7, 1972, which resulted in 217 "Yes" and 114 "No" votes in the 33rd Precinct of the 8th Ward and 202 "Yes" and 151 "No" votes in the 66th Precinct of the 18th Ward. The respective complaints also alleged that the petitions were defective; that notice of the filing of the petitions was not given to the residents of the respective precincts; and that the elections were illegally conducted.

Plaintiffs filed amendments to their complaints alleging that the Act's failure to provide actual notice to resident voters and retail liquor licensees for the respective precincts of the circulating and filing of local option petitions was a violation of Article I, Section 2, of the Constitution

of the State of Illinois and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

The record discloses that notice by publication was given in the Chicago Today newspaper on October 5, 1972, of a local option election to be held on Tuesday, November 7, 1972, in the 33rd Precinct of the 8th Ward and the 66th Precinct of the 18th Ward of the City of Chicago.

On appeal the plaintiffs limit their argument to the contention that Article IX, Local Referendum, of the Liquor Control Act (Ill. Rev. Stat. 1971, ch. 43, pars. 166 et seq.) is unconstitutional because "Sections 167, 169 and 170, Chapter 43, supra, are completely void of any actual notice requirements to either resident voters or resident business licensees of the precinct prior to, during or after the circulation and filing of a local option petition"; and that "opponents to a 'wet-dry' proposition must be afforded an opportunity to lobby in their own behalf during the circulation of local option petitions." Defendants contend that the plaintiffs are not entitled to such notice because it is not required by the Act.

Paragraph 167 provides for the filing with the City Clerk of a local option petition at least 60 days before an election containing the signature of not less than 25 per cent of the legal voters from the precinct; that the

submission of the question to the voters of such precinct at such election shall be mandatory when the petition has been filed in proper form; and that notice of the filing of the petition and the result of the election shall be given to the Secretary of State.

Paragraph 169 provides that any five legal voters of the precinct, within any time up to 30 days immediately prior to election, may contest the validity of the petition by filing a petition in the Circuit Court, setting forth the grounds for contesting the validity of such petition. Any legal voter of the precinct may appear in person or by counsel to defend or oppose the validity of the petition for election.

Paragraph 170 of the Act provides for notice of an election by publication after the petition has been filed with the City Clerk.

However, the Act does not provide for notice to the resident and retail licensee of the respective precincts of the circulating and filing of the local option petitions. The courts have held that the only notice necessary is that provided by the Act.

In People v. McBride (1908), 234 Ill. 146, 84 N.E. 865, the court held it was not necessary to give notice other than that provided by the Act, stating at pages 171-172:

"It is next urged that the act provides for an election without any notice. It may be conceded that notice is essential to a valid election, but no such question is involved in this case. The act provides for notice, and, after specifying the notice to be given, provides that the failure to give notice shall not affect the validity of the vote. The question whether that provision is valid could only arise upon a failure to give the prescribed notice, and whether such failure would invalidate an election might depend upon the facts of the particular case, such as whether there was a mere irregularity in giving notice, whether the voters all knew of the proposition, and whether the result was affected in any way. That question does not arise on this record and could not affect the whole act."

Similarly, in the case at bar, the record discloses that notice by publication was given in the Chicago Today newspaper on October 5, 1972, of the local option elections to be held on Tuesday, November 7, 1972, in the 33rd Precinct of the 8th Ward and in the 66th Precinct of the 18th Ward of the City of Chicago. Therefore, the reasonable notice requirements of the Act were met and it was not necessary to give notice to the resident voters and retail licensees of the precincts of the circulating and filing of the local option petitions.

In Hornstein v. Liquor Control Com. (1952), 412 Ill. 365, 106 N.E. 2d 354, the court held that under the then existing statute the Liquor Control Act did not violate the due process clauses of the Federal and State Constitutions when it failed to provide for notice and a hearing prior to the revocation of a liquor license, stating at page 369:

"The right to deal in intoxicating liquors is not an inherent right, but is always subject to the control of the State in the legitimate exercise of its police power."

In People v. Smith (1938), 368 Ill. 328, 333, 14 N.E.2d 82, the court held that there is no inherent right to sell intoxicating liquors; that it is the policy of the State to consider the right to such traffic as permissive only; and that the electors of cities and villages may pass upon the question of whether intoxicating liquor shall be sold within their boundaries. In Malito v. Marcin (1973), 14 Ill.App. 3d 658, 661-662, 303 N.E. 2d 262 (Pet. for lv. to app. den. Jan.1974), this court upheld the constitutionality of the local option provisions of the Liquor Control Act, stating:

"The final argument made by plaintiffs concerns the constitutionality of the local option provisions of the Liquor Control Act under the test of due process. They argue that the license to sell alcoholic beverages at retail is a vested right; that it cannot be taken for public use without the payment of just compensation; and that a fair method for providing just compensation would be to establish a period for amortization of use in excess of the 30 days now allowed under section 168 of Ill.Rev.Stat. 1969, ch.43. Following the reasoning in People v. McBride, 234 Ill. 146, 178-179, we hold that a license to sell alcoholic beverages at retail is not a right but a privilege, and as such it is not subject to the protection of due process under the constitution. The trial court properly dismissed the suits, and the judgment is affirmed."

In light of the foregoing, the plaintiffs were not constitutionally entitled to receive notice of the circulating and filing of the local option petitions, even though the lack of such notice might deprive the opponents of a "wet-dry"

proposition the opportunity to lobby in their own behalf during the circulation of a local option petition.

The defendants argue that the complaints were defective because they were filed after and not prior to the election. The local option election was held on Tuesday, November 7, 1972, in both the 33rd Precinct of the 8th Ward and the 66th Precinct of the 18th Ward of the City of Chicago. The complaint in Shank was filed on December 5, 1972, and in Walker on December 8, 1972.

Paragraph 169 provides that any five legal voters of a precinct may contest the validity of a local option petition within any time "up to 30 days immediately prior to the date of such proposed election." (Ill. Rev. Stat. 1971, ch. 43, par. 169.) Since the complaints were not filed within 30 days prior to the election but subsequent to it, the trial court properly dismissed them with prejudice. Havlik v. Marcin (1971), 132 Ill.App. 2d 532, 270 N.E.2d 189; Schultz v. Marcin (1972), 8 Ill.App. 3d 91, 289 N.E.2d 286; Schierhorn v. Marcin (1973), 10 Ill.App. 3d 551, 294 N.E.2d 771.

Although paragraph 182 of the Act provides for contesting the validity of a local option election, and although the complaints allege that the elections were illegally conducted, the plaintiffs do not argue that point on appeal and it will therefore be considered waived. Ill. Rev. Stat. 1973, ch. 110A, par. 341(e)(7); Certain Taxpayers v. Sheahan (1970), 45 Ill.2d 75, 78, 256 N.E. 2d 758.

The cases cited by plaintiffs are distinguishable
from the facts in the case before us.

The judgments of the trial court are affirmed.

Judgments affirmed.

3D
24 I.A. 794

73-449

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice
 Honorable WALTER DIXON, Justice
 Honorable THOMAS J. MORAN, Justice
 LOREN J. STROTZ, Clerk
 WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On January 2, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

3D

No. 73 449

IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT
SECOND DIVISION

PEOPLE EX REL. DONALD BALLARD,)
)
Petitioner-Appellant,)
)
v.) Appeal from the Circuit
) Court for the 15th Judicial
PETER B. BENSINGER, ET AL.,) Circuit, Stephenson County,
) Illinois.
Respondents-Appellees.)

MR. JUSTICE RECHENMACHER delivered the opinion of the court:

The defendant was convicted of forgery and sentenced to a term of not less than 2 nor more than 7 years in the penitentiary. He was paroled in April, 1972, but in May, 1972, he was arrested on a charge of illegal transportation of liquor, a violation of his parole. Defendant pleaded guilty to this charge. A few days later he was again arrested as a hitchhiker. On June 13, 1972, defendant was returned to Joliet penitentiary, without a preliminary hearing, and on July 5, 1972, his parole was formally revoked pursuant to a hearing before the Parole Board.

The present appeal arises out of the dismissal of defendant's habeas corpus petition alleging that his parole was illegally and unconstitutionally revoked.

During the pendency of this appeal the defendant was again admitted to parole and is presently on parole.

Defense counsel, the Deputy State Appellate Defender, has filed a motion to withdraw from the case now on appeal under the authority of Anders v. California (1967), 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396, for the reason that the appeal is without merit.

(See People v. Jones (1967), 38 Ill. 2d 384.)

The Deputy Defender in support of his motion for leave to withdraw, has considered and analyzed both the merit of the appeal based on the facts and the law applicable thereto and the further fact that this appeal is moot because of the defendant's present release on parole.

The defendant's appeal is based on what he conceives to be the violation of his rights to a preliminary hearing on his parole revocation as set forth in Morrissey v. Brewer (1972), 408 U.S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593. However, as indicated in the Appellate Defender's brief, Morrissey has no application where the violation of parole is admitted, as was the case here, and moreover, Morrissey was obviously intended to have only a prospective application and in this case the defendant was arrested and returned to prison for parole violation prior to the opinion in Morrissey. Thus there does not appear to be any legal basis for defendant's appeal based on that case and we agree with defense counsel that there is no ground for disturbing the trial court's judgment.

Accordingly, we affirmed the judgment of the trial court denying the petition for Writ of Habeas Corpus and grant the motion of defense counsel, the Appellate Defender, for leave to withdraw. Judgment affirmed and Motion to withdraw allowed.

THOMAS J. MORAN and DIXON, JJ., concur.

24 I.A.³⁰ 832

(24540-4M-9-70) 160-0



STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE HAROLD F. TRAPP, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 30th day
of December A. D. 19 74, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

FILED

DEC 30 1974

STATE OF ILLINOIS

13130

APPELLATE COURT

FOURTH DISTRICT

Robert L. Conn, CLERK
APPELLATE COURT 4TH DISTRICT

General No. 12234

Agenda No. 74-39

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee

v.

KENNETH FRANK KREISA,

Defendant-Appellant

Appeal from
Circuit Court
McLean County
72-CF-598

Mr. JUSTICE SMITH delivered the opinion of the court:

The defendant appeals from a sentence of two and one-half to ten years in the penitentiary by the circuit court of McLean County imposed on a jury's verdict finding the defendant guilty of burglary. In this court the defendant charges (1) that the indictment is insufficient because it does not identify the car beyond giving the name of the owner, (2) that the court erred in admitting a knife into evidence and a conviction in Wisconsin for a misdemeanor, (3) that the court failed to properly instruct the jury on the issue of circumstantial evidence, (4) that the defendant's guilt was not established beyond a reasonable doubt, and (5) that the sentence imposed is not in compliance with the statute.

The defendant, a resident of Wisconsin, came to Bloomington to visit friends and registered at a motel for a week. Arriving at the friend's house at 9:00 A.M., he and his friend, Delbert Kessinger, began to consume beer and drank until about 4 P.M. They went down to the Sportsman's Club in Bloomington and continued to drink. They had some food about 6 P.M., and then returned to the Sportsman's Club with Mrs. Kessinger. She testified that the defendant was glassy eyed and drunk at 10 P.M. and she took her husband home at that time. Defendant testified that when he left the Sportsman's Club, he had difficulty in starting his car and then drove on into a parking lot near his motel. At about 2 A.M. a Bloomington detective noticed the defendant about one and one-half blocks away walking back and forth in front of the Red Lion, a night club. It was closed. Defendant was observed through binoculars. He looked north and south several times, glanced into a car, looked around, stood against the building and then walked around and up an alley behind the Red Lion to the original place in the parking lot where he had been when Detective Crowe first saw him. He got into a car parked in the parking lot. It was a black 65 Buick four-door car. He entered on the driver's side and was in that car about two minutes and the detective testified that he saw something shining in the defendant's hand but could not tell what it was. Defendant then walked to another car and entered from the passenger's side. The second car was a 1972 white over green Pontiac, four-door hardtop and belonged to a Detective Mountjoy. Defendant stood at the right-hand door for about 30 seconds and then entered the car by the door on the

passenger side. The detective radioed for help and approached the defendant in the car. The detectives testified that they told him he was in the wrong car and he said he was looking for a place to sleep. The defendant denies that he said this. He testified that he was looking for his own car, couldn't remember where it was, and was looking for the screwdriver which he kept in the compartment of his own car so that he could start it.

The defendant's testimony is that he had registered under an assumed name because he was in Illinois as a Federal parole violator and that he had two previous convictions of felonies and no more. When confronted with a certified copy of a Wisconsin conviction, he readily admitted it and stated that he thought it was a misdemeanor rather than a felony and that's why he answered as he did.

The defendant alleges that the indictment is fatally defective where it alleges that the defendant entered "a motor vehicle as defined in the Illinois Vehicle Code, said vehicle being owned by Ernest W. Mountjoy" and specified the time and place of the entry. In support of his contention, the defendant cites People v. Tripkovich, 6 Ill.App.3d 37, 284 N.E.2d 323. That case did not involve a motor vehicle but did point out that the material allegations of a burglary indictment are to show that the premises burglarized were not the property of the defendant, to enable the accused to prepare for trial and to plead acquittal or conviction in bar of a subsequent prosecution for the same offense. That case further stated that "if these functions of an allegation and proof have been realized the

conviction should not be reversed." These functions of an indictment have been set out by our supreme court in People v. Harden, 42 Ill.2d 301, 247 N.E.2d 404 and People ex rel Miller v. Pate, 42 Ill.2d 283, 246 N.E.2d 225. It is quite clear from the defendant's own testimony in this case that it was this car in which the defendant was found by the detectives and that such indictment is sufficient to support a conviction.

Defendant further objects that the large kitchen knife which was found in the detective's car at the time the defendant was arrested coupled with the other detective's testimony that when the defendant got out of the first car, he had something shining in his hand is sufficient identification of this particular knife and connects the exhibit with the defendant in that the knife was in the car at the time of the arrest. Officer Mountjoy testified that when the knife was picked up it was taken to the officer in charge of records and evidence and that it was returned to him by that officer and transferred to the courtroom. There does not seem to be any chain missing in the continuity of possession and the knife was properly admissible in evidence. People v. Judkins, 10 Ill.2d 445, 140 N.E.2d 663; People v. Cain, 35 Ill.2d 184, 220 N.E.2d 195.

The defendant likewise contends that the admissibility of defendant's conviction in Wisconsin for conviction of theft was a misdemeanor and therefore under People v. Montgomery, 47 Ill.2d 510, 268 N.E.2d 695, should not be admitted into evidence. No objection was made to its admissibility and as a matter of fact this defendant testified to previous felony

convictions for theft. His own counsel brought out that the reason he didn't mention the Wisconsin conviction was that he [defendant] thought or he [defense counsel] thought that only evidence of previous felonies were admissible. Such is not the rule under Montgomery. When offered to attack the credibility of a witness, it is not necessary that the crime be a felony but under paragraph 2 of the Montgomery rule, a conviction which "(2) involves dishonesty or false statement regardless of the punishment". It seems to us somewhat specious to argue that theft does not involve dishonesty and the other requirements of Montgomery were fully complied with. Indeed Justice Burger [now Chief Justice] has recognized the validity of this inference in Gordon v. United States, 383 F.2d 936,940, when he said: "In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity." There was no error in admitting this conviction into evidence and arguing it before the jury on the credibility of the testimony of this defendant.

The defendant likewise argues that a circumstantial evidence instruction should have been given in this case and it is true that when the sole evidence is entirely circumstantial, IPI Criminal 3.02 should be given. (People v. Dennison, 7 Ill. App.3d 675, 288 N.E.2d 516.) In this case, however, we do not deal with circumstantial evidence. What the police officers saw and testified to and the testimony of the defendant as to his actions are of occurrence events. The defendant admitted that he was in the car. The intent to commit a theft therein can

only be proved circumstantially by inferences drawn by the fact-finder or jury. (People v. McCoy, 3 Ill.App.3d 642, 279 N.E.2d 417.) It was for the jury to determine from the evidence before it whether or not the defendant was guilty of an intent to commit a theft in the motor vehicle. The evidence discloses that the defendant looked in the glove compartment of the car where valuables, if any, would normally be kept. It becomes then a question for the jury to determine whether the defendant was truthful in saying that he was looking for a place to sleep - a statement that he denies making - or whether he was searching for something valuable or for a means by which he might take the car. He also testified that he was looking for a screwdriver and thus thought he was in his own car.

The defendant further argues that he was not proven guilty beyond a reasonable doubt. We have set forth the evidence generally speaking and believe it was for the jury to determine whether or not this defendant was merely inebriated and wandering around at 2 A.M. lost, or whether or not the defendant, a Federal parole violator who had registered at the motel under an assumed name, intended to burglarize the car. There is no way other than by the conduct of the person as to whether or not the intent was to commit a theft. We do not deal with the situation similar to the one in People v. Soznowski, 22 Ill.2d 540, 177 N.E.2d 146, where the Supreme Court held that where a defendant was charged with burglarizing a dwelling house with a felonious intent to steal property of the owner and the evidence showed that the owner's wife was awakened by somebody beating her on the face was legally inconsistent with any intent to commit a theft

or to steal and accordingly reversed the judgment. In the case at bar, we do have an overt act of rummaging through the glove compartment of the car. There is no dispute but that defendant knowingly entered the car unlawfully. The jury chose to believe that the defendant was looking for something of value - a conclusion that reasonable men might reach from the evidence in this record. We do not believe that it is appropriate for us to reverse a criminal conviction unless the evidence in support thereof is so improbable as to raise a reasonable doubt of guilt. (People v. Mills, 40 Ill.2d 4, 237 N.E.2d 697; People v. Stringer, 52 Ill.2d 564, 289 N.E.2d 631.) While the evidence of intent here is not strong it was for the jury to determine the credibility and to draw the reasonable inferences. On this record, the one drawn by the jury cannot be said to be unreasonable.

We know of no imperfection in the sentence here imposed. Under the Code of Corrections, Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-1, the penalty for a Class 2 felony is stated thus: "(T)he minimum term shall be 1 year unless the court, having regard to the nature and circumstances of the offense and the history and character of the defendant sets a higher minimum term, which shall not be greater than one-third of the maximum term set in that case by the court; * * *." No case has been cited to us nor do we believe that the statute requires a special finding by the court as to the reasons for the sentence. Suffice it to say that the record of this defendant with reference to automobile thefts and the circumstances under which he was found provide a sufficient

foundation for the sentence imposed.

There being no error in this record, the judgment of the trial court is affirmed.

Affirmed.

CRAVEN, J. and TRAPP, P.J., concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Justice
Honorable GLENN K. SEIDENFELD, Justice
Honorable L.L. RECHENMACHER, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On January 6, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

DO NOT PUBLISH
FILED

JAN 6 - 1975

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
GERALD ROBERT RONAN,)
)
Defendant-Appellant.)

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

Appeal from the
Circuit Court of
the 16th Judicial
Circuit, Kane
County, Illinois.

MR. PRESIDING JUSTICE THOMAS J. MORAN delivered the opinion of
the court:

After pleading guilty to burglary, the defendant was sentenced
to serve 2 to 6 years. He now contends that he was improperly admon-
ished under Supreme Court Rule 402, in that the trial court failed to
inform him of both the possible maximum sentence and the nature of
the charge. The record fails to support either contention.

There must be substantial, not literal, compliance with the
provisions of Supreme Court Rule 402. In determining whether substan-
tial compliance has been accomplished, the entire record may be con-
sidered. People v. Krantz, 58 Ill. 2d 187, 192 (1974); People v.
Ellis, Gen. No. 46519, ____ Ill. 2d ____ (1974).

On the issue of maximum sentence the record discloses that
defendant had been counseled by his attorney before executing a
written plea of guilty. Thereafter, upon hearing on his plea of
guilty, defendant responded "yes" when asked by his counsel if he
understood that "the range of punishment on a burglary is from one
to [an] indeterminate period of years". The record also reveals that

during the hearing on probation and sentencing, the court explained the possible maximum punishment by stating that "the penalty can be from anywhere to infinity, which may mean to the end of the world", and again defendant replied that he understood. Instead of questioning the meaning of the terms used, defendant, by his responses, led the court to believe that he understood the maximum punishment that could be imposed. On appeal we have not been directed to any facts in the record which would support a claim either that the defendant misunderstood the possible maximum sentence or that he was prejudiced by the manner in which the maximum sentence was explained.

Instead, defendant relies upon People v. Terry, 44 Ill. 2d 38 (1969) and subsequent appellate court decisions. In Terry, the defendant, after being informed of the minimum sentence, was warned of the maximum penalty by the trial court's statement, "the punishment for burglary is an indeterminate sentence in the penitentiary." The Supreme Court found this to be an insufficient admonition of the possible maximum sentence. In the instant case, unlike Terry, the trial court went beyond such statement and explained the meaning of the word "indeterminate" by asking the defendant if he knew "the penalty can be from anywhere to infinity, which may mean to the end of the world", and the defendant answered, "yes". Under these circumstances, we find that the defendant was sufficiently admonished as to the possible maximum sentence. / People v. Williams, 16 Ill.App.3d 199, 200 (1973), People v. Gaines, 48 Ill. 2d 191, 192-93 (1971) and People v. Scott, 43 Ill. 2d 135, 142 (1969). Also see, People v. Warship, Gen. No. 45376, 59 Ill. 2d 125 (1974), where, on a plea of guilty, defendant was not informed of the minimum sentence; People v. Krantz, supra, where, upon a negotiated plea, defendant was not advised of either the minimum or maximum sentence.)

Also dispelled by the record is defendant's contention that he was not informed as to the nature of the charge. Sometime prior to the hearing on the plea of guilty, defendant moved for a reduction of bail bond. The State objected on the basis that defendant admitted

having committed 13 other burglaries, 3 of the admissions having been reduced to signed, written statements. A portion of one statement, revealing the facts in the present case, was read to the court without objection. It disclosed that defendant was found in a home when the owners unexpectedly returned, that a struggle ensued and that defendant escaped. At the hearing on the plea, the following colloquy occurred:

"Trial Court: And you [defendant] did read that indictment over, didn't you?

[Defense Counsel]: The indictment charging you with the offense of burglary. We discussed that?

Defendant: Yes, sir. Yes, sir.

Trial Court: And [defense counsel] discussed it with you; didn't he?

Defendant: Yes, sir.

Trial Court: Then it is your desire to admit that you are a burglar; is that it?

Defendant: Yes, sir."

During the combined hearing on probation and aggravation and mitigation, defendant and other witnesses testified to the underlying facts substantiating the crime charged.

With this background, we conclude that the trial court not only informed the defendant of the nature of the charge but that defendant understood the same. People v. Krantz, supra; People v. Hardaman, Gen. No. 46299, 59 Ill. 2d 155 (1974); and People v. Mims, 42 Ill. 2d 441, 444 (1969).

Judgment affirmed.

SEIDENFELD, RECHENMACHER, J.J. - concur

24 I.A. ^{3D} 850

73-52

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Justice
Honorable GLENN K. SEIDENFELD, Justice
Honorable L.L. RECHENMACHER, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On January 6, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

FILED

No. 73-52

JAN 6 - 1975

LEON J. STROTZ, Clerk
Appellate Court, 2nd District

IN THE

APPELLATE COURT OF ILLINOIS

DO NOT PUBLISH

SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court of the 19th
v.	)	Judicial Circuit, Lake
	)	County, Illinois
TOMMY GEATER,)	
)	
Defendant-Appellant.)	

MR. PRESIDING JUSTICE THOMAS J. MORAN delivered the opinion of the court:

Defendant was charged, in a two count indictment, with armed robbery and robbery. A bench trial resulted in his being found guilty of both charges and he was sentenced for a term of 5 to 6 years.

On appeal he seeks to have his robbery conviction reversed and his sentence reduced.

There is no dispute that the single sentence was for the armed robbery, and not the robbery charge. There is also no dispute that both crimes arose out of the same transaction. The only dispute arises from this Court's decision in People v. Budzynski, 9 Ill. App. 3d 24, 27 (1973) wherein (based upon our interpretation of People v. Brown, 52 Ill. 2d 94, 103-04 (1972),) we upheld a single sentence imposed for burglary although the defendant was convicted for burglary and attempt theft, both arising out of the same transaction.

Subsequent to Budzynski, the Supreme Court, in People v. Lilly, 56 Ill. 2d 493, 495-96 (1974), (citing People v. Duszkevycz, 27 Ill. 2d 257 (1963) and People v. Schlenger, 13 Ill. 2d 63 (1958),) held that where two counts of an indictment are founded upon a single act of the defendant, there can be but one conviction. The court reasoned that entry of judgment on both charges, although no sentence was imposed on one of the charges, may operate to the defendant's prejudice. The court therefore vacated the judgment of conviction as to the count charging the lesser offense. We find Lilly to be determinative of the same issue before us and, thereupon, vacate the judgment of conviction on the count charging the defendant with the lesser offense of robbery.

As earlier stated, defendant was sentenced to a minimum term of 5 years. Subsequently, during pendency of this appeal, the Unified Code of Correction became effective. The present minimum sentence for armed robbery is 4 years. The Code provides that where the offense being prosecuted has not reached final adjudication, then for the purpose of sentencing, the sentences under the Code apply if they are less than under the prior law upon which the prosecution was commenced. (Ill. Rev. Stat. 1972 Supp., ch. 38, §1008-2-4.) While defendant comes within this provision (his case not having reached final adjudication, People v. Chupich, 53 Ill. 2d 572, 581-84 (1973),) still the provision is not to be automatically invoked.

Defendant argues, based upon various remarks of the trial judge, that a minimum sentence of 4 years would have been imposed if the Code had been effective at the time of sentencing. The State takes the position that it neither favors nor opposes a reduction of sentence in this case. Under the circumstances, we conclude that the interests of justice will be best served by allowing the trial court an opportunity to reassess its sentence in light of the change in the penalty provision for armed robbery.

Judgment of conviction for robbery vacated;
cause remanded for the purpose stated.

SEIDENFELD, RECHENMACHER, J.J. - concur

73-11

People vs. Jerry Jarvis

STATE OF ILLINOIS



APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,
on the 1st Day of January in the Year of our Lord one thousand
nine hundred and seventy-four, within and for the Third District
of Illinois:

Present—

HONORABLE ALBERT SCOTT, Presiding Justice

HONORABLE JAY J. ALLOY, Justice

HONORABLE WALTER DIXON, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on
December 30, 1974 the Opinion of the
Court was filed in the Clerk's Office of said Court, in the words
and figures following, viz:

In The
APPELLATE COURT OF ILLINOIS

Third District

A. D. 1974.

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Will County
)	
vs.)	
)	
JERRY JARVIS,	)	Honorable
	)	Michael A. Orenic
Defendant-Appellant.	)	Presiding Judge.

Mr. JUSTICE ALLOY delivered the opinion of the court: Abstract

Defendant Jerry Jarvis was convicted of murder in a bench trial in the Circuit Court of Will County and sentenced to a term of 20 to 40 years in the penitentiary. The victim was 18-month old Emma Brown, the daughter of his wife by a previous marriage. Defendant raises two issues on appeal, (1) that his guilt was not shown beyond a reasonable doubt and (2) that the sentence imposed was excessive.

The evidence in the case was largely circumstantial. On August 30, 1971, baby Emma Brown was admitted to the Silver Cross Hospital in Joliet suffering from internal injuries. Jarvis told police and social workers, who testified at the trial, that he had been watching television when he heard a loud noise from Emma's room. He went into the bedroom and found that she had fallen from her crib and landed face down on the tile and concrete floor, a 2 to 3 foot fall. Jarvis said that he noticed that Emma was having difficulty breathing, so he splashed water on her face and blew air on her. He then summoned his wife, who had been in the back yard and they took the baby to a neighboring barber, while another person called an ambulance. The barber testified that he gave the baby artificial respiration at that time and that she appeared to be unconscious. Jarvis, at the trial, repeated his story and testified that he never beat Emma but disciplined her instead by spanking her, shaking her by the arms, and standing her in a corner.

Four doctors testified for the State. Dr. Misiow who attended Emma in the emergency room at the hospital, noted various scratches and bruises on her face, neck and chest and fresh and clotted blood in her nose and mouth. X-rays taken later also showed some damage to the right kidney and an accumulation of fluid in the lung cavity.

On September 1, 1971, Emma was taken to St. Luke's Hospital in Chicago, where X-rays further showed fractures of the left arm, left leg, and spinal column. Medical testimony indicated that all fractures had been suffered sometime in the first three weeks in August, at least a number of days before the date upon which the child was brought to the hospital. Apparently the arm fracture had been treated as Emma was wearing a cast when she was brought to the hospital on August 30. The spinal fracture was located near the right kidney, but according to the testimony of Drs. Kallick and Gardner, this fracture was not related to the kidney injury.

On September 1, 1971, Dr. Flannagan operated on Emma and removed a massive accumulation of blood clots near her right kidney, which was not functioning properly at that time. Dr. Flannagan was of the opinion that the clots were caused by a severe external blow to the kidney area, and that it was not unusual to have no external signs of such a blow. At the same time Dr. Kallick removed 200 cc. of blood from Emma's chest cavity, a problem he thought to have resulted from a similar but separate external blow. Dr. Kallick testified that both the chest and kidney injuries were probably caused by blunt forces applied externally and would not have resulted from the fall to the floor. He was of the opinion that both injuries were incurred within 6 to 12 hours preceding Emma's admission to the Silver Cross Hospital on August 30, 1971.

On September 10, 1971, Dr. Flannagan removed Emma's right kidney, but hemorrhaging occurred, and in a subsequent operation on October 1, Emma died. Dr. Flannagan was of the opinion that the kidney injury was responsible for her death and agreed with Dr. Kallick that it was unlikely that such an injury could come from a fall out of a crib.

The State also introduced the testimony of Robert Olin, a cellmate defendant while defendant was awaiting trial in this case. Olin

said that Jarvis talked to him about the case and said he didn't know why "he did the thing to the baby." According to Olin, Jarvis said that he couldn't help himself, that he needed psychiatric treatment, and that he was afraid of what other inmates would do to him when they found out what he had done. Olin also testified that Jarvis said he had told the same story about the fall from the crib to everyone he had talked to, because if he changed it they would know he was lying. Olin also said that Jarvis admitted biting the baby's breast and putting a lit cigarette on her buttocks. Medical testimony indicated marks on the baby which would have apparently been caused by such actions. Jarvis, however, denied ever talking to Olin about his case. Defense counsel also sought to impeach Olin by showing that he had been convicted six times of felonies in California and Florida, including grand theft, burglary and robbery. At the time of the trial, however, Olin was serving in Stateville on a seventh felony charge, possession of drugs. Olin also admitted that the State's Attorney had promised him a favorable parole recommendation in exchange for his testimony in the case, and that Olin had told his lawyer that he had incriminating evidence about two other cellmates. Olin also admitted lying to Jarvis and telling him that his friends could prevent the State's medical witnesses from testifying and Olin also admitted he was trying to "con" Jarvis into giving him the bail money which Jarvis had posted in this case when it was released.

As indicated, defendant argues that the evidence does not show beyond a reasonable doubt the fact of defendant's criminal agency in the death of Emma Brown. While such criminal agency, and the death of the child, is part of the corpus delicti which the State must prove beyond a reasonable doubt (People v. Farnsley, 53 Ill. 2d 537, 293 N.E.2d 600 (1973)), it must also be shown that defendant committed the crime. Circumstantial evidence may be used to show the fact of the criminal agency (People v. Neal, 98 Ill. App. 2d 454, 240 Ill. App. 2d 784 (1968); People v. Holland, 11 Ill. App. 3d 591, 594, 297 Ill. App. 2d 310 (1973)). Medical testimony in this case indicated that

death resulted from a severe external blow to the kidney area, and that a fall from a crib would not likely cause such an injury. It also appears that another roughly simultaneous blow was dealt to the chest area. It is clear that it was shown beyond a reasonable doubt that the cause of death was a criminal act on the part of some individual. The trial judge could properly have concluded that defendant was the one who inflicted the blows. Though there were no eye-witnesses, defendant was apparently the only one in the vicinity prior to the time he carried the baby out of the house. The blow which caused death was struck in that period of time. If Olin's testimony is to be believed, as the trial court apparently did, Jarvis by his own admission did "something" so serious to the baby that he feared what other jail mates would do to him if they found out. Although the defense raised doubts as to Olin's credibility, the trial court was in the best position to make the determination on that issue, and its conclusion should not be rejected unless such determination is manifestly erroneous. (People v. Jackson, 19 Ill. App. 3d 404, 407, 311 N.E.2d 714 (1974)). The evidence as a whole does not leave a reasonable doubt as to the guilt of the accused. A trier of fact is not required to search out a series of potential explanations compatible with innocence and elevate them to the status of reasonable doubt (People v. Russell, 17 Ill. 2d 328, 331 (1959)).

Defendant contends that the penalty is excessive and that, at the most, he should have a minimum penalty of 14 years. Since defendant had no prior convictions and in view of the record before us, we agree. On the basis of the authority given this court to modify sentences in appropriate cases, we herewith modify the sentence imposed as to defendant to a term of 14 years, and affirm the conviction.

Affirmed as modified.

Scott and Dixon, JJ. concur.

74-176
74-177 Cons.
74-178 Cases
74-179

3D
24 I.A. 912

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice
Honorable WALTER DIXON, Justice
Honorable THOMAS J. MORAN, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On December 16, 1974 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

No. 74-176)
 74-177) Consolidated
 74-178)
 74-179)

IN THE
 APPELLATE COURT OF ILLINOIS
 SECOND DISTRICT
 SECOND DIVISION

PEOPLE OF THE STATE OF ILLINOIS,

 Plaintiff-Appellee,

 vs.
 RAY LEE STEWART,

 Defendant-Appellant

)
)
) Appeal from the Circuit
) Court of Winnebago County,
) Illinois, 17th Judicial
) Circuit.

)
) Honorable
) John S. Ghent
) Judge Presiding.

PER CURIAM

A motion to withdraw has been filed in the instant case by Ralph Ruebner, Deputy Defender, and Adam M. Lutynski, First Assistant Defender, who have been appointed as counsel for defendant, Ray Lee Stewart, on appeal. The motion and the record in this cause show:

That on June 12, 1973, the Winnebago County Grand Jury returned four two-count indictments charging the defendant with the offenses of armed robbery (Count I) and robbery (Count II). Each indictment referred to a distinct offense occurring on May 6-7, 1973. Each case had its own Common Law Record and with minor exceptions the records are identical.

On June 28, 1973 the assistant public defender filed a Motion for Appointment of Psychiatrists to determine defendant's fitness to stand trial. The trial court granted the motion on the same day.

By letter of July 5, 1973, Dr. J. G. Graybill reported that Mr. Stewart "does understand the nature of the charges placed against him and is able to cooperate with counsel in his own defense, hence he is competent to stand trial."

By letter of July 9, 1973, Dr. Carl H. Hamann reported that "The defendant is fit to stand trial, as he is suffering from no mental illness or defect, understands the nature of the charges against him, and is able to cooperate with council [sic] in his own behalf."

No fitness hearing was ever held.

On July 30, 1973 the defendant appeared before Judge John E. Sype for the purpose of entering a negotiated guilty plea to Count II (robbery) of the four indictments. In exchange for the guilty pleas to the charge of robbery the State agreed to dismiss all the armed robbery counts. There was no agreement as to sentence.

During the course of admonitions the defendant sought and was granted an opportunity to address the court about his participation in the robberies. He explained to the Court that at the time of the robberies he was "on drugs" and "didn't have control of myself." The trial court, after informing the defendant that "the crime of robbery is a crime involving specific intent" suggested that he consult with his counsel to determine whether he was capable of forming the requisite intent for the offense of robbery. After a recess for the suggested consultation, the defendant informed the court that he no longer wished to enter a guilty plea but would prefer a bench trial. The admonitions ceased, the cause was set for a bench trial and Judge Sype sent the case to Chief Judge O'Sullivan for reassignment. Following a defense motion for substitution of judges, the cause was assigned to Judge Ghent.

On Aug. 29, 1973, the defendant appeared before Judge Ghent for the purpose of entering a guilty plea to the offenses of robbery. During the hearing the Judge informed the defendant of and determined that he understood:

1. the nature of the charge;
2. the minimum and maximum sentences, the possible fine, the possibility of consecutive sentences; the mandatory parole term; and the impossibility of probation because of defendant's prior convictions;
3. that he had the right to plead not guilty, or to persist in that plea or to plead guilty;
4. that if he pleads guilty there will not be a trial of any kind and that by pleading guilty he waives the right to a trial by jury and the right to be confronted by the witnesses against him.

The trial court determined that there was a factual basis for the plea in which factual basis the defendant and his counsel concurred.

The trial court determined that the plea was voluntary by directly questioning the defendant.

Prior to beginning the admonitions the trial court did establish on the record the agreement which existed between the State and the defendant.

After examining the presentence investigation report and conducting a sentencing hearing the Court sentenced the defendant to four concurrent 5 to 15 year sentences. The defendant has a substantial prior record and was on parole for the offense of armed robbery when the present offenses were committed. The Court's sentence is within the statutory limits for a Class 2 felony and complies with the one-third rule. (Ill. Rev. Stat. 1973, Ch. 38, Sec. 1005-8-1(c)(2).

From an examination of the record there are only two possible arguable issues, both of which run contrary to established Illinois case law:

1. The trial court and/or defense should have more fully and completely informed defendant of the possibility of the existence of the affirmative defense of being in a drugged condition at the time of the commission of the offense.

Such an admonition is unnecessary in the case at bar because the offenses charged are robbery and armed robbery, neither of which is a specific intent offense. This Court has held that robbery is

not a specific intent offense. (People v. Whelan, 132 Ill. App. 2d 2.) The defense of voluntary intoxication (and by extension the defense of voluntary drugged condition) is not available to a person charged with a general intent offense. (People v. Berlin, 132 Ill. App. 2d 697; People v. Hunter, 14 Ill. App. 3d 879.)

2. The trial court did not adequately inform the defendant of the nature of the charge in that the judge failed to specifically inquire whether the defendant understood the nature of the charge after reading the indictment in Case No. 2093 and 2095.

With respect to those cases the court read the indictments to the defendant, stated the applicable penalties and then inquired whether defendant understood what had been said. The defect does not rise to the level of reversible error because in Case Nos. 2092 and 2094 the court made the specific inquiry of defendant immediately after having read the indictment to him. Since all of the indictments charging the offense of robbery were identical (with the exception of the name of the victim) defendant's understanding of the nature of the charge in two of the cases indicated his understanding of the nature of the charge in the other two cases. Even under People v. Billops, 16 Ill. App. 3d 892, the reading of the indictment and inquiry about defendant's understanding is substantial compliance with Supreme Court Rule 402(a)(1).

On 28 August 1974 a letter was mailed to defendant notifying him that a Motion for Leave to Withdraw was being filed in the Appellate Court of the Second Judicial District with regards to his appeal, and the consequences of such a motion.

The Motion for Leave to Withdraw and Brief in support thereof is pursuant to the ruling announced in the case of Anders v. California, 386 U.S. 738. After a careful examination of the record in the case at bar and a thorough consideration of every possible issue, counsel has concluded that an appeal would be wholly frivolous and could not possibly be successful.

A copy of counsel's brief has been furnished to the defendant and time allowed him to raise any points that he chooses.

The record shows that the indictments were sufficient to give the court jurisdiction.

After a full examination of all the proceedings, we find the appeal to be wholly frivolous and that the judgment of the Circuit Court of Winnebago County should be affirmed and that there has been adequate compliance with Anders v. California, supra.

Having been satisfied that counsel has diligently investigated the possible grounds of appeal and agreeing with counsel's evaluation of the case we also authorize withdrawal of counsel pursuant to their Motion to Withdraw.

Affirmed.

Dixon, J., concur.
Rechenmacher, P.J. concur
Moran, J. concur
T.J.,

3D
241.A. 917

73-92

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice
Honorable WALTER DIXON, Justice
Honorable THOMAS J. MORAN, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On January 9, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
SECOND DIVISION

FILED

JAN 9 1975

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

FEDERAL INSURANCE COMPANY, a)	
corporation, GREEN GIANT COMPANY,)	
a foreign corporation, and)	
MICHAEL JAMES SOOTER,)	
)	
Plaintiffs-Appellants,)	
)	
v.	)	Appeal from the Circuit
	)	Court for the 17th
COUNTRY MUTUAL INSURANCE COMPANY,	)	Judicial Circuit,
a Mutual company and GERALD E.	)	Winnebago County, Illinois.
MARRS,)	
)	
Defendants-Appellees.)	

MR. JUSTICE RECHENMACHER delivered the opinion of the court:

This is an appeal from a judgment of the circuit court of Winnebago County granting summary judgment in favor of Country Mutual Insurance Company in a declaratory judgment suit brought by Green Giant Company and its liability insurance carrier, Federal Insurance Company, asking that Country Mutual's policy be declared to be the primary insurance.

Country Mutual insured the liability of Gerald E. Marrs under an automobile liability policy. Federal insured the liability of Green Giant Company but provided in its policy that the insurance was excess as to any other valid and collectible insurance available to the insured covering a non-owned or hired automobile.

Gerald E. Marrs, a farmer, leased his truck to Green Giant for harvesting operations during the spring of 1969. His individual automobile liability policy with Country Mutual,

covering the leased truck, contained the normal provision excluding coverage while the truck was "rented or leased to others, unless such use is specifically declared and described in this policy." Sometime prior to June 10, 1969, Green Giant requested that Gerald E. Marrs furnish them with a certificate of insurance certifying that Marrs was insured against liability for personal injury and property damage arising out of the operation of the leased truck. Accordingly, Marrs applied to his agent, the Country Mutual agent, Wayne Canode, for such a certification and on June 10, 1969, the agent issued and delivered to Gerald E. Marrs a paper designed "Certificate of Insurance", indicating that it was issued at the request of Green Giant Company, showing the name of the insured as Gerald Marrs, describing the leased truck and showing the kind and limits of the coverage, but containing no policy provisions. Green Giant accepted this certificate as complying with its request and assigned one of its employees, Michael James Soter [Sooter], to drive the truck. On August 31, 1969, Soter, while driving the said truck, was involved in an accident with one Gilbert Redmon, also a Green Giant employee, as a result of which accident Redmon filed suit against Soter and Green Giant. Upon receipt of summons Green Giant notified Federal who tendered the defense of the suit to Country Mutual, contending that Federal's policy was excess as to the Country Mutual policy covering Marrs because the certificate provided by Marrs afforded coverage to Green Giant. Country Mutual declined to defend Green Giant on the basis of a provision in its policy excluding coverage while the described vehicle was rented or leased to others unless such use was specifically declared and described in the policy.

It is contended by Federal that Country Mutual is estopped to deny coverage to Green Giant because its agent knew or, from past dealings, should have known, that it was the intention as between its insured, Marrs, and Green Giant, that the purpose of the certificate of insurance was to afford coverage under the Country Mutual policy to Green Giant for leased trucks such as that of Marrs. To this Country Mutual replied that it had no certain knowledge as to who would drive the truck for Green Giant and was not under a duty to inquire but that in any event it had no privity with Green Giant, made no commitment to Green Giant, received no premium from Green Giant and never intended by the certificate to abrogate the exclusion in its policy for the benefit of Green Giant. (Actually, for the benefit of Federal Insurance Company, since Green Giant was protected in any event by Federal's policy.)

The principles of waiver and estoppel (which are distinguishable--estoppel, being in our opinion, the applicable theory here) have been exhaustively discussed as they apply to insurance contracts both in the cases and in treatises dealing with insurance coverage (See 43 Am. Jur. 2d Insurance §1052-1100). We see no need to dwell on these doctrines beyond the narrow point at issue. We need not consider the question of estoppel as between Marrs and Country Mutual for Marrs is not a defendant in the litigation between Redmon and Green Giant and he is not asserting and has no reason to assert estoppel against Country Mutual. It is Green Giant who is claiming that since Country Mutual's agent knew or should have known that the certificate he furnished was intended to cover and protect Green Giant while the Marrs truck was leased to them and, since the agent induced Green Giant to believe they were covered by issuing the certificate

to Green Giant, Country Mutual is now estopped to invoke the lease exclusion in the Marrs policy.

We consider this theory first from the standpoint of the facts as developed from the testimony at the trial. While it is plain from the testimony of Marrs that he did not intend to drive the truck himself and he knew that Green Giant would assign one of its own employees to drive it, it does not appear that there was any particular commitment or agreement in this regard, it was just what had normally occurred in the past. Indeed, Marrs testified that if the regularly assigned driver could not drive the truck, he would be available to do so. However, the crucial point in this connection was the knowledge of the agent. While the appellant contends that the agent knew definitely and specifically that a Green Giant employee would be driving the truck, rather than Marrs, this does not appear from the testimony of the agent to be anymore than a deduction on his part. Marrs testified he did not tell the agent, "[I] would not be driving or I would be driving, either one". The Country Mutual agent, Canode, in answer to the question whether Marrs ever made any representations as to the use of his truck by himself or some other person in hauling produce, replied, "I don't know. He just said he wanted a Certificate of Insurance. As far as what he was doing with the truck, I didn't know, or who was driving it." It does not appear from this testimony either that Marrs definitely informed the agent or the agent inquired as to who would be driving the truck and the fact that the agent may logically have assumed that someone other than Marrs might be driving it is not sufficient to form the basis for an estoppel as to Green Giant. We agree with the trial court that the evidence, to begin with, does not establish clearly the basis of an estoppel even as between Marrs and Country Mutual.

But in any event, even if it was clear as to what Marrs told the agent and what the agent knew as to the actual driver of the truck, the circumstances would not create an estoppel as between Country Mutual and Green Giant. Country Mutual had no relationship with Green Giant and no obligation to them except not to actively deceive them. Country Mutual did what Marrs requested--they furnished a certificate acknowledging that Marrs had insured his liability with respect to the operation of a certain described truck with Country Mutual. They were not required to consider what Green Giant might imply from this certificate for they had no obligation to Green Giant. The certificate was furnished to their own insured, Marrs, and in no way constituted a commitment or contract to take care of Green Giant's liability arising out of the operation of this particular truck. (Jennings v. Bituminous Cas. Corp. (1964), 47 Ill. App. 2d 243.) Green Giant, in effect, is contending that an exclusion which is a standard provision of Country Mutual's policy was abrogated as to Green Giant's liability in operating the Marrs truck because Country Mutual's agent did not inform Green Giant of such exclusion. It is not claimed there was any misrepresentation by the agent nor any promise to insure Green Giant. Nor would it have been at all difficult for Green Giant to have informed themselves as to the coverage by obtaining a copy of the Country Mutual policy or by direct information from the Country Mutual agent as to the leasing provision in question. Brehm v. American Dental Assn. (1972), 6 Ill. App. 3d 33.

Green Giant's theory of estoppel, not being founded on anything positive such as deceit or misrepresentation, is a form of estoppel in pais and must therefore depend on the existence of a duty by Country Mutual's agent to Green Giant to inform them of the coverage. If there was no such duty there obviously was no obligation on which estoppel by silence could be founded. (See In re Estate of Boysen (1966), 73 Ill. App. 2d 197.) It is clear, however, that the Country Mutual agent

did not represent Green Giant, had no dealings with them, received no consideration from them for extending the policy to cover Green Giant (without the leasing exclusion) and in short was not in privity with Green Giant. Country Mutual owed a duty to Marrs as its insured, but it owed no duty to Green Giant. It received no premium from Green Giant, which paid its premiums to and had its liability policy with Federal Insurance Company.

Since Country Mutual's agent had no legal relationship to Green Giant which would place them under a duty to explain a policy exclusion, the general principles governing estoppel by silence (estoppel in pais) do not apply. (28 Am. Jur. 2d Estoppel and Waiver §53 at 667, 668). Whether estoppel in pais would operate against Country Mutual if invoked by Marrs we need not consider because Marrs was not injured and is not complaining. The Country Mutual agent, not being in privity with Green Giant, had no duty to go beyond the furnishing of the certificate. The mistake--if there was an actual mistake as to the coverage afforded--was founded on an unwarranted assumption by Green Giant that it was entitled to exactly the same coverage as Marrs himself. The agent did not deceive them in this regard--they deceived themselves--and they would not have been deceived if they had made inquiry as to the effect of the leasing arrangement on the Marrs policy. The agent's mere failure to volunteer the existence of an exclusion in the policy under the circumstances is not sufficient to waive a standard policy provision, (Fidelity & Cas. Co. v. Napleton Motor Sales (1972), 5 Ill. App. 3d 705, also see generally 28 Am. Jur. 2d Estoppel and Waiver §35-36 at 641, 642).

There is no fraud or misrepresentation here. The certificate does not purport to be a policy of insurance. It speaks only for itself. As was said by this court in Consumers Const. Co. v. American Motorists Ins. (1969), 118 Ill. App. 2d 441, 452: "The certificate is unambiguous and represents only that a policy had been issued. The policy, of course, is the best evidence of the contract of insurance."

There is no reason to suppose that for the nominal premium of \$43 received by Country Mutual for insuring Marrs it would, upon direct request by Green Giant, have agreed to extend its policy to cover Green Giant's liability arising out of the negligence of any one of its numerous employees who happened to be driving the Marrs' truck. Green Giant should not have, by its own inaction, a broader coverage than it might have been able to secure if it requested such coverage directly and specifically from Country Mutual.

Various cases have been cited by Green Giant and Federal to bolster their contention as to the applicability of the doctrine of estoppel under the circumstances here present. But we do not find any of them apposite to the circumstances before us. This is not a case of third party beneficiary as in Gothberg v. Nemerovski (1965), 58 Ill. App. 2d 372, for the contract was made for the benefit of Marrs alone and prior to the lease. The certificate of insurance afterward furnished to Green Giant was not in any sense a contract, it merely undertook to supply certain requested information. Nor was it, like Royal Loan Corp. v. American Surety Co. (1961), 29 Ill. App. 2d 250, a case of misrepresentation, nor, like Security Ins. Co. of Hartford v. Mato (1969), 108 Ill. App. 2d 203, a suit in contract for damages due to failure to issue a promised policy of insurance. The case of Fidelity Gen. Ins. Co. v. Nelsen Steel & Wire Co. (1971), 132 Ill. App. 2d 635, involved the construction of some ^{policy} provisions

which were held to be ambiguous and conflicting to the point where the ambiguity must be resolved against the insurer.

There is no such ambiguity here.

It is our opinion, under the facts as established by the pleadings and the testimony adduced at the trial, that Country Mutual did not undertake by its certificate of insurance to afford liability coverage to Green Giant and that Green Giant was not in a relationship to Country Mutual requiring Country Mutual to provide any information or comment on its coverage except as shown by its certificate. The agent's possible familiarity with Green Giant's custom of leasing private trucks created no obligation to Green Giant on the part of Country Mutual, except to state the information on the certificate accurately. Green Giant could easily have discovered the exclusion in the Marrs policy if it had used due diligence, and no representation was made and no contract entered into by Country Mutual with Green Giant which would relieve Green Giant from making sure it was covered under the circumstances of its lease of the Marrs truck.

Accordingly, it is our opinion that Green Giant is not covered under the Country Mutual policy issued to Marrs, the certificate of insurance being merely evidence of the existing policy. (See Consumers Const. Co. v. American Motorists Ins. (1969), 118 Ill. App. 2d 441.) Since the terms of the policy were not amended by reason of the certificate, the exclusion as to leased vehicles applies and Country Mutual's policy is therefore not available to cover Green Giant's liability to Gilbert Redmon. That being so, there is only one liability policy in force applicable to the accident in question which is the Federal policy.

The judgment of the Winnebago Circuit Court is therefore affirmed.

Judgment affirmed.

THOMAS J. MORAN and DIXON, JJ., concur.

24 I.A. 923^{3D}

73-51

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Justice
Honorable L.L. RECHENMACHER, Justice
Honorable WILLIAM L. GUILD, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On JAN 13 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

FILED

JAN 13 1975

No. 73-51

LEON J. STANLEY, Clerk
Appellate Court, 2nd District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the
	)	Circuit Court of
v.	)	the 19th Judicial
	)	Circuit, Lake
WILLIAM TIMMONS,	)	County, Illinois.
)	
Defendant-Appellant.)	

MR. PRESIDING JUSTICE THOMAS J. MORAN delivered the opinion of the court:

A jury's verdict found the defendant guilty of forgery and he was sentenced to imprisonment for a term of one to three years.

The State's evidence, established by three witnesses, was that defendant entered a tavern and, after ordering a beer, handed a check to the tavern owner requesting that it be cashed. The check, made payable to and endorsed by one John Oliver, was drawn upon the account of a construction company. The owner examined the check and returned it to defendant saying that he did not have sufficient cash on hand but that he would call his wife to deliver the necessary amount. Instead of calling his wife, the owner telephoned the police. The police did not arrive until 45 minutes later. During this period of time, defendant walked to the end of the bar and turned right toward the back door. Upon noticing that the owner was somewhat ahead of him in walking toward the back door, defendant registered a look of surprise, turned left and entered the washroom.

After he exited the washroom, the owner remained near the back door and a patron stationed himself near the front door. The owner testified that defendant appeared "scared and nervous" during this period of time. Subsequent to arrest, defendant consented to a search of the automobile he had been driving. In the search, five other similar checks were found in the glove compartment.

The defense was established by the testimony of the defendant. To account for possession of the checks, he testified that the one presented to the tavern-owner had been obtained in a crap game in which he and three others had participated two days earlier. He stated that he had known two of the game participants for a period of time but that the person who put the check into the "pot", one referred to during the game as "John", was previously unknown to him. At the conclusion of the game, John requested a ride to another tavern, defendant agreed to drive him there and John waited in defendant's car while defendant conversed with the other two participants. The defendant denied knowing either that the check presented to the tavern-owner was forged or that there were five similar checks in the glove compartment of the auto.

On appeal, defendant claims that the State's evidence was insufficient to prove, beyond a reasonable doubt, that he knew the check presented to be forged and that he could not therefore be guilty of intent to defraud, a necessary element of the charge.

Intent to defraud may be inferred under proper circumstances and where a forged instrument is uttered, the intent to defraud is presumed. (People v. Bailey, 15 Ill. 2d 18, 23-24 (1958).) Knowledge, like intent, is an element characterized as subjective in nature, seldom capable of being proved by direct evidence and

ordinarily established by surrounding circumstances. At bar, there is no dispute that the checks were forged, that defendant attempted to cash one of them and that the five similar checks were found in the car he was driving. These facts, together with defendant's behavior in the tavern, were surrounding circumstances which the jury could properly consider.

Contrasted against this background, the jury also considered the defendant's version as it related to his possession of the checks. True, defendant was not required to prove his innocence nor even to testify but, by taking the stand, his testimony was to be considered and weighed in accordance with the rules applicable to any other witness. (People v. Urbana, 18 Ill. 2d 81, 92 (1959).) The jury was entitled to disbelieve defendant's accounting for the possession of the checks, (People v. Morehead, 45 Ill. 2d 326, 330 (1970),) although rejection of defendant's testimony would not compensate for a deficiency in the State's proof (People v. Jordan, 4 Ill. 2d 155, 163 (1954)). Having elected to explain his possession of the forged checks, it was incumbent upon the defendant to tell a reasonable story or to be judged by its improbabilities. People v. Meyers, 412 Ill. 136, 145 (1952).

From our review, we are of the opinion that the jury properly rejected defendant's explanation of his possessing six forged checks. We conclude that the State's evidence contained sufficient surrounding circumstances upon which the jury could find, beyond a reasonable doubt, that at the time defendant attempted delivery of the check to the tavern owner he knew that it was forged and that he presented it with intent to defraud.

Judgment affirmed

GUILD, RECHENMACHER, J.J. - concur

24 I.A. 993³⁰

73-325

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice

Honorable WALTER DIXON, Justice

Honorable THOMAS J. MORAN, Justice

LOREN J. STROTZ, Clerk

WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On January 21, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

FILED

JAN 21 1975

No. 73 325

LOREN J. STROITZ, Clerk
Appellate Court, 2nd District
~~Abstract~~

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
SECOND DIVISION

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from the Circuit
	)	Court of the 19th Judicial
JAMES M. STANLEY,	)	Circuit, Lake County,
	)	Illinois.
Defendant-Appellant.)	

PRESIDING
MR./JUSTICE RECHENMACHER delivered the opinion of the court:

Defendant appeals from his conviction after a jury trial of driving while under the influence of intoxicating liquor and of leaving the scene of two accidents, one involving an attended vehicle and another involving an unattended vehicle, and the imposition of a sentence of 9 months conditional discharge and 3 fines, aggregating \$370. At trial defendant entered into a stipulation with the State that he was operating the vehicle which was involved in those two accidents and on appeal has confined his argument to the charge of driving while under the influence of intoxicating liquor.

We consider first his contention that he was not proved guilty beyond a reasonable doubt. Two witnesses including the driver of the first car which defendant struck testified with regard to the two accidents and to the fact that defendant's car left the scene and drove on. Gregory Breslay, a Libertyville police officer, testified that on the evening of October 11, 1972, at about 8:48 p.m. he received a police radio report of an accident with personal injuries at West and Lake Streets in Libertyville and arrived at

the scene with another officer within one minute thereafter. Defendant's car, its front end badly damaged, was resting against a utility pole. The lights were not on, the ignition was in the "on" position with the motor dead and the car was in the "gear" position. Defendant had both hands on the steering wheel and made gestures back and forth on the wheel as if he was driving the automobile. Officer Breslay noticed a cut on the defendant's chin and asked the defendant if he needed aid. The defendant answered that he did not feel he needed any. The officer then asked the defendant to get out of the vehicle; defendant started to get out and staggered and stumbled. The two police officers then had to hold him up and escort him to the squad car. Officer Breslay noticed an odor of alcohol on the defendant's breath. The defendant stated that he had been drinking earlier and Officer Breslay then placed him under arrest. After Breslay told defendant he was involved in an accident defendant "mumbled a few words" which Breslay did not comprehend. Upon arrival at the police station defendant had to be helped out of the car and up a stairway and he was seated in front of a video tape camera operated by Sgt. Reitinger. When the officer asked defendant to sign a form consenting to breath analysis defendant began looking for his glasses. When it became apparent defendant had no glasses on his person Officer Breslay said he would have defendant's car checked in an effort to find them.

In response to Officer Breslay's questions in filling out the alcoholic influence report form defendant answered that he had been at the Sheraton Waukegan Inn, had three glasses of gin there between 6:30 p.m. and 8:30 p.m., and when asked if he was ill answered "Not immediately ill, other than I'm a diabetic." Defendant stated that he had last seen his doctor on August 4

and was taking insulin injections, the last one having been "this morning"; that defendant was not hurt, had not received a bump on the head and was not aware he had been in any accident. Officer Breslay then had defendant perform a "simple balance test" and described the defendant as "swaying". (The video tape indicated that defendant almost fell in attempting to perform this test.) In the "walking-the-line" test, the defendant straddled the line with both feet on either side of the line, instead of walking heel-to-toe as he was requested to do. On the "finger-to-nose" test defendant missed his nose several times. (The video tape shows that he was attempting to touch his nose with his thumb instead of his index finger, as he was requested to do.) The "coin test" was given to the defendant but because he did not have his glasses the court barred that portion of the video tape as well as testimony concerning that test. Officer Breslay then took him to the booking room where Sgt. Reitinger gave the breathalyzer test. (The result of that test was not offered into evidence because defendant was given the two breath tests 10 minutes apart instead of the prescribed 15 minutes.) Before that test the defendant's glasses were recovered and returned to him.

Officer Breslay was with the defendant for about an hour. He further testified that he was aware that there are certain symptoms of diabetes which are similar to intoxication, but that in his opinion, based on 4 years of police experience and his observations of over 100 persons who were under the influence of intoxicating liquors, defendant was under the influence of intoxicating liquor and his driving ability was impaired.

Sgt. Reitinger testified that he was in the employ of the Libertyville police department for the past 7 years. He operated the video tape equipment which filmed the interview with the

defendant and the tests, and had occasion to observe the defendant about 45 minutes. He was aware that the defendant had a diabetic condition and had observed several diabetics, including his own father. Sgt. Reitingger testified that as a police officer he had occasion to observe 300 to 400 persons under the influence of intoxicating liquor and over 8000 as a private citizen; that based on that experience it was his opinion that the defendant was under the influence of intoxicating liquor. On cross-examination he testified that there were court determinations of some of such cases and that in none of them was there a determination that the person was not under the influence.

The defendant testified on his own behalf that on September 20, 1971, he was diagnosed as a diabetic and upon release from the hospital was given a special diet, requiring four meals a day one of which is a "snack", providing for consumption of carbohydrates; he was also to take an insulin injection daily before breakfast. He also testified that he had had surgery which resulted in an 8-inch scar in the groin area, and that on October 11, 1972, the scar had been healed for about 3 months and was still painful.

He testified that in the morning of that day he took his insulin injection, had breakfast, went to work at Goodyear Tire and Rubber Co., had lunch, and at 5:30 p.m. drove to the Sheraton Waukegan Inn to a company cocktail party which was to be held for out of town technical representatives. Prior to 6:30 p.m. defendant watched a baseball game on television at the Inn. Between 6:30 p.m. and 8:15 p.m. or so he drank three gin martinis which he mixed for himself; the last one he mixed at about 7:30 p.m.

He further testified that when he left the Inn he was going straight home to eat because he had missed his supper (although he knew he could have obtained a meal or at least toast at the Inn). On the way home he suddenly felt "dizzy" and "clammy", remembers making a turn, that he had a "very, very vague memory of hitting something", and later felt a "bump" with "no idea of what" he "hit". He then made a turn to avoid an oncoming car and the next thing he recalled was seeing the police at the car. (He also testified that the last time he felt so dizzy was in May or June of 1972 and that at that time he took two tablespoons of syrup and lay down, which brought him back to normal at once.)

After the defendant's car came in contact with the utility pole and the police arrived he felt very "unsteady and confused" and "disoriented". After the tests were completed at the station two co-workers came and took him home where he arrived at 11:00 p.m. He then had a light meal, immediately "got back toward normal" and went to bed; the following morning he went to work although he had a headache and his jaw was swollen. Defendant stated his opinion that he was not under the influence of alcoholic liquor.

On cross-examination defendant testified that he could have stopped the car when he first became dizzy but did not do so, and that he was not aware of striking a second vehicle but did recall striking the pole;^{2.} that he did not tell the police officers at the scene that he was injured or had recent surgery, and that he did not ask them for toast or bread or indicate that it would assist him.

The defendant's wife testified that he was on a special

diet, that she saw him at 11:00 p.m. when his friends brought him home from the station. She described him as being "very shaky and unsteady and seemed sort of dazed", with a cut on his jaw and blood on his tie; that defendant seemed steadier after eating supper, and that the following morning he complained of aches, pains and bumps; his jaw was swollen but he went to work after eating breakfast.

The two co-workers who brought the defendant home from the station testified to the following: that they had seen him earlier at the cocktail party and saw him drinking and saw him leave; that they observed nothing unusual about his walking. When they left the party defendant did not indicate he was ill and did not ask to be taken to the hospital. One of them stated that when he saw defendant at the police station defendant had a "pretty severe cut" on his chin and was dazed, in a shaken condition and was "very, very unsteady".

Neither the defendant's wife nor his two co-workers were asked to, nor did they, express an opinion as to whether the defendant was under the influence of intoxicating liquor.

The defendant admitted that he drove his motor vehicle and entered into a stipulation with the State that in the course of doing so his automobile struck an attended vehicle, and farther down the road struck a parked vehicle. His car did not come to a stop until later after crashing into a utility pole.

Defendant argues that since he was a diabetic and there was testimony that diabetics may exhibit reactions similar to those under the influence of intoxicating liquor, it is the only explanation for his conduct, and therefore he was not proven guilty beyond a reasonable doubt of driving while he was under the influence of intoxicating liquor. He cites several cases but relies

primarily on People v. Varley (1972), 8 Ill. App. 3d 657. In Varley, the defendant testified that he was under the care of two doctors, one of whom was treating him for an inner ear condition. This testimony was corroborated by the doctor (who was a board certified specialist in the field of ear, nose and throat). The doctor testified that the defendant was his patient for many years and received treatment for a pathological condition which affects equilibrium, and that persons suffering from that disease may give the appearance of intoxication without consuming alcohol. Also a witness testified that when he picked defendant up at the police station about 30 minutes after the arrest defendant showed no evidence of intoxication and was perfectly normal. Varley is not apposite.

The other cases cited by defendant are also distinguishable from the instant case. In none of them was there any corroboration, as here, of the arresting officers' opinion that defendant was under the influence of intoxicating liquor.

In the case at bar two experienced police officers testified that defendant's breath had an odor of alcohol, that he had difficulty walking and that he failed the balance and other tests given to him and that while aware of the appearance of a person with diabetes or in insulin shock, they were of the opinion that the defendant was under the influence of intoxicating liquor. The jury heard that testimony and viewed the video tape showing defendant's behavior and speech. They also heard the testimony of the defendant, his wife and his two co-workers. The jury undoubtedly noted that none of defendant's witnesses were asked to render an opinion as to his sobriety. They returned a guilty verdict after consideration of the evidence. We are of the opinion that there was sufficient evidence to support the jury's verdict, and we find no basis whatever for substituting our judgment for that

of the trier of fact, here the jury, as to defendant's guilt. (See People v. Novotny (1969), 41 Ill. 2d 401, 412.) The jury heard and observed all of the witnesses and they were in a better position than a reviewing court to determine the weight to be given to the testimony.

Next, the defendant states in his brief, without citing any authority or other argument, that "it was grossly unfair to the defendant" for the trial court "to remove this instruction from consideration by the jury":

"Mere consumption of alcoholic beverage does not establish intoxication; there must be sufficient proof of facts tending to show intoxication before defendant can be adjudged guilty of driving a motor vehicle while under the influence of alcohol."

The trial court gave other adequate instructions to the jury framed in the language of the statute as to the offenses with which the defendant was charged, as well as those regarding the presumption of his innocence and the State's burden to prove him guilty beyond a reasonable doubt. The tendered instruction was properly refused. "Mere consumption" may or may not be adequate to cause a person to become intoxicated. Defendant's counsel used the language of the refused instruction in his argument to the jury (as the trial court suggested when he refused the tender).

We now consider the defendant's contention that he was prejudiced by a communication between the jury and the trial court out of defendant's presence. About an hour after the jury was sequestered the jury foreman gave the bailiff a note asking if they could render a verdict of "no opinion". At the trial judge's instruction the bailiff told the foreman and the jury to "go over their instructions because the answer to their question was contained in their instructions". Four hours later the jury returned a verdict of guilty on all three charges.

Defendant concedes that the law in Illinois requires the defendant to show prejudice as a basis for setting aside a jury's verdict based on communication outside the presence of the defendant. (See People v. Drayton (1972), 7 Ill. App. 3d 812.) He argues, however, that he was prejudiced because the jury was in effect ordered by the trial court "to keep deliberating and arrive at conclusions from matters not in the record." We cannot agree with this interpretation. All that the court here did was to direct the jury to the instructions they were already given and its action was obviously not prejudicial. See People v. Pierce (1974), 56 Ill. 2d 361.

Therefore, the judgment is affirmed.

Judgment affirmed.

THOMAS J. MORAN and DIXON, JJ., concur.

FOOTNOTES

1. Sgt. Reitinger also testified that for about 20 years "on and off" he was employed by a detective agency, a burglar alarm firm, a "security" firm and a burglary alarm association.
2. On direct examination defendant's first recollection, after making a turn to avoid an oncoming car, was seeing the police.

73-203

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice
 Honorable WALTER DIXON, Justice
 Honorable THOMAS J. MORAN, Justice
 LOREN J. STROTZ, Clerk
 WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:
On January 21, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

Abstract

No. 73-203

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
SECOND DIVISION

FILED

JAN 21 1975

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

EXCHANGE SECURITY BANK,)	
)	
Plaintiff-Appellant,	)	Appeal from the
	)	Circuit Court for
v.	)	the 18th Judicial
	)	Circuit, DuPage
ROY O'GWIN,	)	County, Illinois
)	
Defendant-Appellee.)	

MR. JUSTICE THOMAS J. MORAN delivered the opinion of the court:

Plaintiff appeals from an order dismissing its complaint.

Defendant executed two promissory installment notes, one, dated May 21, 1965, for \$3274.92 and the other, dated June 18, 1965, for \$300. In December of 1965, defendant defaulted in payment on both notes. On January 24, 1973, plaintiff filed a complaint to recover the balance due upon the notes (\$1060.13) together with attorney's fees and costs.

Defendant filed a motion to dismiss the complaint, claiming, as one ground, that plaintiff was barred by the equitable doctrine of laches. No evidence was introduced and, upon conclusion of counsels' arguments, the trial court dismissed the complaint with prejudice on the basis of laches.

Defendant has neither appeared nor filed any briefs in this appeal. For this reason it would be proper to reverse, pro forma, the order appealed. King v. King, ____ Ill. App. 3d ____ (1975) (Gen. No. 74-1, Second District, Second Division, filed December 16, 1974.)

We choose, however, to add another reason for reversal of the order. The basis for the trial court's order, laches, was in error. Plaintiff's action, founded upon written promissory notes, was subject to Section 16 of the Limitations Statute. (Ill. Rev. Stat. 1965, ch. 83, §17.) Under this section, plaintiff was within its rights to commence the suit "within 10 years next after the cause of action accrued." Plaintiff's action accrued at the time of defendant's default, December, 1965. Its action was commenced on January 24, 1973, within the limits prescribed by the statute. Plaintiff should not have been barred from proceeding in the case. See In re Estate of Feldman, 387 Ill. 568, 579 (1944).

Judgment reversed; cause remanded for further proceedings.

RECHENMACHER, P.J., and DIXON, J. - concur

3D
24 I.A. 994

73-310

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice

Honorable WALTER DIXON, Justice

Honorable THOMAS J. MORAN, Justice

LOREN J. STROTZ, Clerk

WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On January 21, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

JAN 21 1975

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District
Abilene

No. 73-310

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
SECOND DIVISION

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,)
)
 v.) Appeal from the Circuit
) Court of the 15th Judicial
PATRICK FANE,) Circuit, Lee County,
) Illinois.
 Defendant-Appellant.)

PRESIDING
MR./JUSTICE RECHENMACHER delivered the opinion of the court:

Defendant was tried by a jury and was convicted of the offense of unlawful delivery of a controlled substance. He was sentenced to a minimum term of 1 year and 3 months and a maximum term of 3 years and 9 months. His principal contention on appeal is that he was not proved guilty beyond a reasonable doubt because, he urges, the prosecutor failed to establish by a sufficient chain of possession that the substance the defendant sold to the agents was the same substance tested by the crime laboratory and admitted into evidence at trial.

On November 17, 1971, at the farmhouse in Dixon where the defendant lived, he sold to John Sandusky and Pete Lackey, undercover agents of the Illinois Bureau of Investigation, 4 tin foil packets containing a white powdery substance which defendant represented he believed to be heroin. (At that time defendant was a heroin user and testified that he was then trying to "kick" the habit.) Agent Lackey received the packets from defendant and with Agent Sandusky returned to their apartment in Streator which they shared with a third person.

Agent Lackey died prior to the time of trial. At trial, Agent Sandusky testified to the purchase as well as to subsequent events. He testified that the packets (with their contents) were in Agent Lackey's custody until they returned to Springfield the next day and were then mailed by them in an evidence envelope (on which they placed a seal and their initials) to the Bureau of Identification Crime Laboratory in Joliet for analysis. He further testified that immediately subsequent to the purchase from defendant they had made a field test of the substance in the packets which indicated that it was heroin.

Gloria Kraatz, the supervising criminologist at the crime laboratory testified that on the following day she received the envelope in a sealed condition, broke the seal which was the same one the agents placed on it, and after analysis resealed it. Her tests disclosed the presence of heroin in the packets.

There is not the slightest suggestion in the record of any substitution, alteration or other tampering with the packets or their contents, and we conclude that the chain of custody was sufficiently proved. In our opinion, the State complied with the standards required under Illinois law. People v. Richards (1970), 120 Ill. App. 2d 313, 339; People v. Washington (1968), 41 Ill. 2d 16, 24; People v. Anthony (1963), 28 Ill. 2d 65, 68-69, and People v. Harper (1962), 26 Ill. 2d 85, 91. See also People v. Harris (1974), 19 Ill. App. 3d 531, 538-539.

Next, the defendant contends that the sentence should be reduced to the minimum sentence of from 1 to 3 years. He argues that the trial court imposed a greater sentence as a punishment for defendant's having demanded a jury trial and for defendant's failure to return to this jurisdiction for trial. At the sentencing hearing in imposing sentence the trial judge said in part as follows:

"[T]he court feels that a sentence to the penitentiary is in order. On deciding what amount of time to sentence you to the penitentiary, the court is considering the following factors: In testifying in court you were honest and admitted to sale, but not in the sense of pleading guilty--you admitted the sale and raised the defense of entrapment. The jury didn't believe that you were entrapped, but I am giving you the credit for not standing up there and lying and denying you ever sold the drug.

"On the minus side, in deciding what sentence to impose, is the fact that, from your own testimony, you learned someplace in New Mexico that you were being sought here for selling drugs, you did not turn yourself in, you continued on to California and got involved and was convicted of a further offense involving the use of narcotics, or drugs anyway--whether you call LSD a narcotic or not is a question for the medical people. That works on the minus side.

"The minimum sentence that I could impose if I was to send you to the penitentiary would be one to three years, because the minimum must not exceed one-third of the maximum, and the minimum can be no less than one year. This court has sentenced other young men convicted around the time that you were of selling heroin to one to three years on a plea of guilty. Because of the difference between their case and yours, when you were being sought you did not surrender yourself, the court is going to impose a sentence to the penitentiary for a term of years with the minimum sentence of one year and three months and a maximum sentence of three years and nine months. The minimum sentence to be imposed shall not be less than one year and three months and the maximum sentence to be served shall not be more than three years and nine months."

In People v. Capon (1961), 23 Ill. 3d 254, 257, our Supreme Court refused to interfere with the discretion vested in the trial judge where the sentence was within the statutory range, despite inappropriate remarks by the trial court at the time of imposing sentence. In affirming the sentence in that case the court said:

"[T]he record reveals that the court, in pronouncing sentence said 'If he had come in and pleaded guilty, it might have been different. All I can do is sentence him in accordance with the statute. You take your chance when you take a jury, one to life in the

penitentiary.' In other words, the contention is that the punishment was not justified by the circumstances, and the court committed a grave abuse of discretion.

"Although the court's choice of language in pronouncing sentence is inappropriate, the penalty was justified, as he had been informed, in aggravation, of defendant's prior convictions. Therefore, it cannot be said that the court abused its discretion in pronouncing a sentence within the statutory limit. People v. Calhoun, 22 Ill. 2d 31."

In People v. Moriarity (1962), 25 Ill. 2d 565, 567, a heavy sentence was obviously imposed in part for the defendant's exercise of his right to a jury trial. While the Supreme Court there reversed and remanded, it cited with approval its holding in Capon.

In the case at bar the trial court had before it the record of defendant's convictions for drunkenness and disorderly conduct in 1970, and, in California for possession of LSD in 1972. Moreover, the trial court merely added 3 months to the statutory minimum sentence. While the court's remarks were inappropriate the punishment imposed was justified based on the court's consideration of all proper elements.

The judgment of the circuit court of Lee County is affirmed.

Judgment affirmed.

THOMAS J. MORAN and DIXON, JJ., concur.

73-410

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable ALBERT E. HALLETT, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On January 24, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

Abstract

73-410

FILED

IN THE

APPELLATE COURT OF ILLINOIS

JAN 24 1975

SECOND DISTRICT

LOREN J. STROTZ, Clerk
Appellate Court, Second District

PEOPLE OF THE STATE OF ILLINOIS,)
) Appeal from the 18th
Plaintiff-Appellee,) Judicial Circuit
)
v.) DuPage County, Illinois.
)
TONY WALKER,)
)
Defendant-Appellant.)

MR. JUSTICE GUILD delivered the opinion of the court.

Upon a negotiated plea the defendant, then 16 years of age, pled guilty to the charge of murder, was sentenced to 14-30 years and committed to the Illinois Department of Corrections.

On July 11, 1972 the defendant, in company with another young boy, entered the 7-Eleven store located in Woodridge, Illinois. After picking up several items for purchase, he went to the counter where Jennifer Chrastka was a clerk, pulled a gun from his shirt and shot and killed her. The State's Attorney of DuPage County filed a petition for adjudication of the delinquency of the minor on the 12th of July, 1972. On July 17, 1972, the State's Attorney appeared in the juvenile division of the DuPage County circuit court and advised the court that he was going to proceed against the defendant minor as an adult under the then applicable provisions of the Juvenile Court Act. (Ill.Rev.Stat. 1971, ch. 37, par. 701-1 et seq.) Upon a hearing in the juvenile court, the judge stated that he did not object to the criminal prosecution of the respondent minor and entered an order terminating the proceedings under the Juvenile Court Act. The defendant was thereupon indicted on August 24, 1972.

On September 21, 1972, counsel for the defendant moved to dismiss the indictment contending that Section 2-7(3) of the Juvenile Court Act (Ill.Rev.Stat. 1971, ch. 37, sec. 702-7(3)) was unconsti-

tutional in that it violated constitutionally required due process of law and equal protection of law because it did not allow the Juvenile Court Judge discretion to determine whether jurisdiction should be retained in cases involving a crime allegedly committed by a juvenile. The motion to dismiss was denied.

Prior to his negotiated plea, several psychiatrists examined the defendant as to his mental capacity to stand trial. He was found to be competent and the negotiated plea was entered as indicated.

In this appeal defendant raises the same issues as in the trial court and additionally contends Section 2-7(3) of the 1971 Juvenile Court Act is unconstitutional because no guidelines or standards are set forth by which the Juvenile Court Judge and the chief judge are to act in making the decision as to whether to prosecute the defendant as a minor or as an adult and that such failure to set forth guidelines and standards constitutes a violation of due process of law. Defendant also argues that the failure to provide for a hearing on the petition to remove the case from the Juvenile Division is violative of due process.

The defendant herein relies upon Kent v. United States (1966) 383 U.S. 541, 16 L.Ed.2d 84, 86 S.Ct. 1045.

The Supreme Court of Illinois has considered these arguments in People v. Bombacino (1972) 51 Ill.2d 17, 280 N.E.2d 697, cert. denied, 409 U.S. 912 and in People v. Handley (1972) 51 Ill.2d 229, 282 N.E.2d 131, ^{cert. denied,} 409 U.S. 914. The court further considered the same issues in People v. Sprinkle (1974), 56 Ill.2d 257, 307 N.E.2d 161, cert. denied, ____ U.S. ____.

The defendant contends that the amendment to Section 2-7(3) of the Juvenile Court Act in 1973, as found in Ill.Rev.Stat. 1973, ch. 37, sec. 702-7(3), indicates that the Legislature of Illinois considered the prior Act under which this defendant was prosecuted unconstitutional. Defendant, therefore, challenges the Act of 1971 prior to the amendment effective January 1, 1973.

Certiorari was denied by the Supreme Court of the United States as to the case of People v. Bombacino, supra, in 1972.

(Bombacino v. Illinois, 409 U.S. 915, 34 L.Ed.2d 173, 93 S.Ct. 230.)

At the time of the filing of briefs herein, counsel for the defendant pointed out that on February 20, 1973 a writ of habeas corpus was subsequently issued by Judge Julius Hoffman of the Federal District Court for the Northern District of Illinois as to Bombacino. (U.S. ex rel. Bombacino v. Bensinger, (72 C 2937, USDC N.D.Ill.) Counsel also pointed out that there was an appeal pending from this proceeding. We find that the Seventh Circuit Court of Appeals, on June 19, 1974, reversed the granting of the writ of habeas corpus by the Federal District Court and held that the court was

"...satisfied that there is no inflexible requirement that a statement of reasons always be given by a juvenile judge before allowing a transfer to occur. The need for a statement of reasons in any procedural context must be evaluated in the light of the function such a statement would perform." (U.S. ex rel. Bombacino v. Bensinger (7th Cir. 1974), 498 F.2d 875, 878.)

The Circuit Court of Appeals went on to find that there was no requirement in Kent v. United States, supra, or in the due process clause of the Federal Constitution that required a probable cause determination before a youth could be tried as an adult under the provisions of the then applicable Illinois statute relative thereto. Counsel for the defendant, in substance, would have us reverse the Illinois Supreme Court decisions in People v. Bombacino, supra, People v. Handley, supra and People v. Sprinkle, supra. Obviously, this we will not do, particularly in view of the fact that the Seventh Circuit Court of Appeals has held the procedure followed herein was constitutionally proper.

The conviction of the defendant for the crime of murder is affirmed.

AFFIRMED.

SEIDENFELD, P.J. and HALLETT, J. CONCUR.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 2nd day of December, in the year of our Lord one thousand nine hundred and seventy-four, within and for the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice

Honorable WALTER DIXON, Justice

Honorable THOMAS J. MORAN, Justice

LOREN J. STROTZ, Clerk

WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On January 27, 1975 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:



IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
SECOND DIVISION

FILED

JAN 27 1975

CLERK
Appellate Court, 2nd District

JOAN R. MURPHY, as Administrator of)
the Estate of ROBERT T. MURPHY,)
Deceased,)
Plaintiff-Appellant,)
v.)
JAMES B. HOOK,)
Defendant-Appellee,)
and ALLSTATE INSURANCE COMPANY,)
Garnishee.)

Appeal from the
Circuit Court of
the 15th Judicial
Circuit, Ogle
County, Illinois.

MR. JUSTICE THOMAS J. MORAN delivered the opinion of the court:

This appeal is from the dismissal of a garnishment complaint. During pendency of defendant's appeal from a \$70,000 judgment against him, this Court increased the amount of the appeal bond. Upon defendant's failure to file a bond, plaintiff instituted a garnishment complaint to recover proceeds due defendant under a policy of liability insurance issued by the garnishee. On the garnishee's motion, the trial court dismissed the complaint stating that it was premature since the judgment upon which the complaint was founded was on appeal and therefore was not final. Plaintiff now appeals the dismissal of the garnishment complaint and raises various questions which need not be answered because of the conclusions reached herein.

Issues are said to be moot when they present or involve no actual controversy, interests or rights of the parties (Siefferman v. Johnson, 406 Ill. 392, 396 (1950),) and a reviewing court will not dispose of

an appeal on its merits where it has notice that no actual rights or interests of the parties will be affected thereby. Wheeler v. Aetna Casualty & Surety Co., 57 Ill. 2d 184, 189 (1974).

A garnishment action is an ancillary proceeding designed to obtain satisfaction of the judgment rendered in the original or principle action; it is not a separate or distinct suit. (White Way Sign Co. v. Seltzer Pontiac, 56 Ill. 2d 342, 344 (1974).) When the principle judgment ceases to exist, so also do the grounds for the ancillary action attempting to enforce that judgment. First Nat. Bank v. Hahnemann Inst., 356 Ill. 366, 371 (1934); Alsen v. Stoner, 114 Ill. App. 2d 216, 224-25 (1969).

When, pending appeal, an event occurs which renders it impossible for the reviewing court to grant any effectual relief, the court will not proceed to a formal judgment, but will dismiss the appeal. City Bank & Tr. Co. v. Bd. of Educ., 386 Ill. 508, 521 (1944).

In this case, the reversal of the underlying judgment which gave rise to the garnishment proceedings rendered plaintiff's complaint without foundation. Under such circumstances, this court is unable to grant any effectual relief.

For these reasons, the motion of garnishee is allowed and the appeal is dismissed.

Appeal dismissed.

RECHENMACHER, P.J. and DIXON, J. - concur

^{3D}
24 I.A. 1045

73-291 Cons.
73-295 Cases

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
 Honorable WILLIAM L. GUILD, Justice
 Honorable ALBERT E. HALLETT, Justice
 LOREN J. STROTZ, Clerk
 WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On January 29, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

73-291)
Nos. Consolidation
73-295)

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
	)	Appeal from the Circuit
v.	)	Court for the Fifteenth
	)	Judicial Circuit, Stephenson
HOWARD COPUS and PATRICK J.	)	County, Illinois.
HART,)	
)	
Defendants-Appellants.)	

MR. PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

In accordance with their negotiated pleas of guilty to possession of a controlled substance under a provision of the Controlled Substances Act (Ill.Rev.Stat. 1973, ch. 56½, par. 1402(a)(5))¹ defendant Howard Copus was sentenced to a term of 4-8 years imprisonment; and defendant Patrick J. Hart was sentenced to a term of 4-6 years

-
- 1 The provisions of the Controlled Substances Act relevant to the pleas are:

"Except as otherwise authorized by this Act, it is unlawful for any person knowingly to possess a controlled substance. Any person who violates this Section with respect to:

(a) the following controlled substances and amounts, *** is guilty of a Class 1 felony for which an offender may not be sentenced to death. The fine for violation of this subsection (a) shall not be more than \$100,000;

(5) 200 grams or more of any substance containing a derivative of barbituric acid or any of the salts of a derivative of barbituric acid;"

imprisonment. Both defendants appeal contending only that the statute under which they were convicted is unconstitutional.

Defendants contend that the term in the statute "knowingly to possess" has no clear meaning, is not otherwise defined in the Controlled Substances Act and that therefore the statute is unconstitutionally vague and void. They argue that the terms "knowingly" and "possess" have complex legal meanings and without definition are themselves insufficient to describe the criminal offense; that this is illustrated by the fact that the terms are defined when used in the Criminal Code (e.g. Ill.Rev. Stat. 1971, ch. 38, pars. 4-2, 4-5); but that the definitions in the Criminal Code cannot be included in the Controlled Substances Act by implication. The State responds that defendants have no standing to challenge the constitutionality of the statute inasmuch as they acknowledged its validity by their plea and have waived the issue by not raising it in the trial court. In any event, the State contends that the definitions in the Criminal Code are included in the Controlled Substances Act by necessary implication.

We agree with the contention of the State that the issue raised by defendants here for the first time is not subject to review because of their failure to raise the issue of constitutionality below.

The question of the constitutionality of a statute is properly preserved for review only when it has been raised in and passed upon by the trial court. People v. Luckey (1969), 42 Ill. 2d 115, 117, U.S. cert. den. 397 U.S. 942; People v. Amerman (1971), 50 Ill.2d 196, 197; People v. Cooper (1974), 17 Ill.App. 3d 934, 939; People v. Hamil (1974), 20 Ill.App.3d 901, 904; People v. Smith (1974), 20 Ill.App.3d 1003, 1004; People v. Brata (1970), 121 Ill.App.2d 439, 443.

Grasso v. Kucharski (1968), 93 Ill.App.2d 238, 241-42. Defendant for the rule that an unconstitutional statute is void and proceedings under it a nullity is not relevant. In Grasso, the statute in question was attacked in the trial court on a motion to dismiss. The statute had been declared unconstitutional in another case and the issue was whether that ruling applied retroactively to the case before the court.

We find no cause to excuse the operation of the waiver rule in the circumstances before us. Before acceptance of the plea, both defendants were specifically advised that each was pleading guilty to knowing possession of more than 200 grams of a substance containing a derivative of barbiturate acid or any salts of a derivative of barbiturate acids, and each acknowledged his understanding to that effect.

We, therefore, affirm the judgments below.

Affirmed

GUILD, J. and HALLETT, J. concur.

24 I.A. ^{3D} 1048

(24540-4M-9-70) 160-o



STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE SAMUEL O. SMITH, Presiding Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 17th day
of December A. D. 19 75, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 12269

Agenda 74-35

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellant)	
)	
v.	)	Appeal from
	)	Circuit Court
ARTHUR LEE JOHNSON,	)	Champaign County
	)	72-X-1129
Defendant-Appellee)	

Mr. PRESIDING JUSTICE SMITH delivered the opinion of the court:

A jury found the defendant guilty of forgery and theft of property over \$150. The court entered judgment on these verdicts but only sentenced the defendant upon the forgery conviction to 2 to 7 years. From his post-trial motion, we gather that defendant views his trial as unfair, that there are errors in the instructions given to the jury, failure to direct a verdict, lack of a chain of evidence with regard to the principal document--a check, unbelievability of the principal witness, lack of identification of him as the person involved, and error in sentencing, i.e., he should have been granted probation. His court-appointed attorney had moved to withdraw as counsel and states that he has reviewed the entire record on appeal, researched the appli-

cable law, and that as to the various points raised, it is his professional opinion that he appeals without merit. Accordingly, we will examine the record to satisfy ourselves that such is the case.

One of the principal witnesses testified that she had just received her paycheck, placed the same in her pocketbook, left the same on her desk and left the room. When she returned she heard footsteps coming down the hall, looked up and saw two men running by the door. She testified that one of them was the defendant. At that point she realized her purse was missing. Another witness, the bank teller, testified that defendant presented this paycheck for payment. She asked the defendant if he wanted to cash the check and he nodded yes--but at the same time remembering that there was a stop payment order on the check because it had been stolen. A detective from the police department soon arrived and he arrested the defendant. The defendant himself testified that he presented the check for payment to the teller and that he got the check from a young lady whom he had met outside in front of his door. He testified that while he didn't know her, he had seen her before. He testified that she called him over to the car and asked him if he would cash the check for her. After agreeing to do so, she signed the check and gave it to him and he then went into the bank to cash it. He denied endorsing the check. Needless to say, the lady in the car was not produced, for as defendant testified, he did not know where she was living and did not know her name.

From this short recital there was ample proof to sustain the verdict for forgery. Our examination of the record discloses that he was fairly tried and fairly convicted. All of the instructions were IPI instructions and from our examination of them, eminently proper. The chain of evidence argument, which is hard to grasp, is likewise without merit as all the witnesses, including the defendant, testified that this was the check. It is likewise hard to grasp the issue defendant makes of identifications. From our recital, the identification could not have been better. The fact that witnesses differ on minor details and one is more positive than another, doesn't render the identification any less positive. The other assignments likewise are not sustained by the record.

The facts indicate that both the theft offense and the forgery offense arose from a single transaction. In People v. Lilly, 56 Ill.2d 493, 309 N.E.2d 1, our supreme court held that where several counts of an indictment are based on a single act of the defendant, there can be only one conviction. Hence, if the judgment entered on the greater offense is valid, a conviction for a lesser offense arising from the same act must be reversed whether or not a sentence was imposed thereon. In the instant case, the court entered judgment for both theft and forgery but only imposed a sentence on the latter offense. Therefore, the conviction for theft must be reversed.

With regard to the sentence--while defendant was eligible for probation, we can discern no abuse by the court in imposing

the sentence that he did. The presentence report reflects defendant's almost constant embroilment with the law.

Accordingly, the judgment and sentence for forgery is affirmed; the judgment for theft is reversed; and the cause is remanded to the circuit court of Champaign County with directions to issue an amended mittimus. The motion to withdraw as counsel is allowed.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH DIRECTIONS.

TRAPP and CRAVEN, JJ., concur.

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